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In the Supreme Court of the United States

No. .....

OCTOBER TERM, 1954.

WEST EDMOND HUNTON LIME UNIT,
a body politic and corporate,
Appellant,

vs.

J. M. YOUNG and KATE YOUNG,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of the State of Oklahoma rendered in this case on June 15, 1954, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of the State of Oklahoma is reported in 275 P. 2d 304. The District Court of Oklahoma County wrote no opinion. A copy of the opinion of the Supreme Court of the State of Oklahoma, and of the dissenting opinion of Justice Williams, concurred in by Chief Justice Halley, is attached hereto as Appendix A.

JURISDICTION.

(i) This case is a civil action, brought in the District Court of Oklahoma County by appellees, on behalf of themselves and other persons alleged to be similarly situated, to obtain from appellant damages and an accounting for breach of an alleged duty to sell appellees' crude oil at a price higher than that for which appellees themselves sold it. It was filed under 12 Okl. Stat., §§ 10 and 233. The District Court entered judgment for appellant, but this judgment was reversed by the Supreme Court of the State of Oklahoma.

(ii) The date of the judgment of the Supreme Court of the State of Oklahoma here sought to be reviewed was June 15, 1954, on which date said court delivered and filed its opinion, containing its judgment. A petition for rehearing was filed by appellant on August 26, 1954, being within the time permitted by the rules of said court. Such petition for rehearing was denied on September 28, 1954. Appellant filed its Notice of Appeal with said court on December 22, 1954.

(iii) The statutory provision believed to confer on this Court jurisdiction of the appeal is Section 1257 of Title 28, United States Code, which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case are *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 (1938), *Treigle v. Acme Homestead Association*, 297 U. S. 189 (1936), *Veix v. Sixth Ward Association*, 310 U. S. 32 (1940), *American Railway Express v. Kentucky*, 273 U. S. 261 (1927), and other cases hereinafter cited.

(v) The state statute whose validity is here involved is the Unitization Law of the State of Oklahoma (52 O. S. Supp. 1949, Sec. 286.1 *et seq.*), as construed herein by the Supreme Court of Oklahoma. Such statute is set forth in Appendix B hereto.

QUESTIONS PRESENTED BY THE APPEAL.

The following questions are presented by this appeal:

1. Whether the Unitization Statute of the State of Oklahoma (52 O. S. Supp. 1949, Section 286.1 *et seq.*) as interpreted by the Supreme Court of Oklahoma in the judgment and order appealed from, impaired the obligation of the division orders and other contracts referred to in the record of this case, in violation of Section 10 of Article I of the Constitution of the United States.

2. Whether the Unitization Statute of the State of Oklahoma (52 O. S. Supp. 1949, Section 286.1 *et seq.*), as interpreted by the Supreme Court of Oklahoma in the

judgment and order appealed from, deprived the holders of such division orders and other contracts of their property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the judgment and order of the Supreme Court of Oklahoma, here appealed from, deprived appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States by subjecting it to a liability which was never intended by law and was never voluntarily assumed.

STATEMENT OF THE CASE.

1. The Facts.

Appellees, hereinafter referred to as plaintiffs, are the owners of the mineral rights in 480 acres out of the several thousand acres of land in the West Edmond oil field in the State of Oklahoma. About 1942 they executed oil and gas leases to various oil companies, covering various parts of these tracts, reserving in each lease a one-eighth royalty interest in all the oil and gas produced therefrom.

Upon first production of oil from plaintiffs' lands, plaintiffs executed "division orders"—that is, contracts for the sale of their royalty oil—under which they agreed to sell to a purchaser, until further notice, all the oil received by plaintiffs from the wells on their lands. A copy of one such division order, which was stipulated by the parties to be typical of all of them, appears on page 190 of the record certified by the state court, and a copy thereof is attached hereto as Appendix C. As the Court will note, this division order, which covers royalty oil from a portion of plaintiffs' lands, was executed August

10, 1943, and the purchaser of the oil thereunder was Champlin Refining Company.

No notice of termination of these division orders was ever given by plaintiffs, and it was stipulated by the parties at the trial of this case that such division orders had been in full force and effect since the date of first production of oil from plaintiffs' lands, and that plaintiffs had been paid for all their oil pursuant thereto (R. 114).*

On July 29, 1947 the West Edmond Hunton Lime oil and gas pool, in which the wells on plaintiffs' lands were located, was "unitized" by an order of the Corporation Commission of the State of Oklahoma, under the provisions of the unitization statute of the State of Oklahoma, of which a copy appears as Appendix B hereof. Said order became effective October 1, 1947.

The unitization statute had been enacted in 1945 as a conservation measure designed to make possible the unitized operation of an entire pool of oil and gas, in order that greater recovery might be had therefrom for the benefit of all the owners thereof and the citizens of Oklahoma. Under unitization, royalty interests and operating rights in separately owned tracts of land are pooled or unitized, so that the owners of interests in a particular tract receive an allocated share in the production from the entire pool instead of receiving the oil and gas which is actually produced from their tract.

Similarly, the owner of operating interests in a particular tract, instead of bearing all the expense incurred on that tract, bears a proportionate share of the expenses incurred in developing the entire pool.

Administration of the unitization statute is entrusted to the Oklahoma Corporation Commission, which is au-

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* References are to the typewritten record certified by the Oklahoma Supreme Court.

thorized to order the creation of a "unit," and to approve a "plan of unitization," after proper notice and hearing. The unit so created is made by the statute a "body politic and corporate." Its governing body is the operating committee provided for in its plan of unitization, who designate one of their members as "Unit Operator," to carry on the operation for them.

Under the unitization statute, a unit owns no property and operates without profit. All property used by it in the operations is held by it, not for its own account, but as agent of the various operating parties in the unit. When it incurs expenses for the production of oil and gas, such expenses are, as above stated, borne pro rata by the owners of operating rights in the unitized pool.

With regard to the unit production—that is, the oil and gas produced from the unitized area—Section 286.10 specifically provides that such production is the property, not of the unit, but of the individual royalty owners and operators, in the proportions respectively allocated to them. The statute goes on to state that the amount of unit production allocated to a separately-owned tract:

> "* * * shall be distributed among, or the proceeds thereof paid to the several persons entitled to share in the production from such separately owned tract in the same manner, in the same proportions, and upon the same conditions that they would have participated and shared in the production or proceeds thereof from such separately owned tract had not said unit been organized, and with the same legal force and effect."

Except in cases where working interest owners have failed to contribute their share of the unit expenses, or where interest owners or their purchasers have made no

provision to take delivery of their share of the unit production—in which cases alone the unit is authorized to sell any of the oil—the production allocated to the respective interest owners is required to be delivered by the unit to them or their purchasers in kind. Thus, Section 286.10 states:

> "If adequate provisions are made for the receipt thereof, the share of the unit production allocated to each separately-owned tract shall be delivered in kind to the persons entitled thereto by virtue of ownership of oil and gas rights therein or by purchase from such owners subject to the right of the unit to withhold and sell the same in payment of unit expense pursuant to the plan of unitization * * *."

The statute further makes it clear that the amount of unit production allocated to a separately owned tract *is to be regarded for all purposes as oil produced from such tract.* Thus, Section 286.10 provides:

> "The amount of the unit production allocated to each separately-owned tract within the unit, * * * shall for all intents, uses and purposes be regarded and considered as production from such separately-owned tract."

With regard to existing property rights and contracts, the first paragraph of Section 286.10 provides:

> "Property rights, leases and other contracts, and all rights and obligations shall meet the provisions and requirements of this act and to any valid and applicable plan of unitization or order of the commission made and adopted pursuant hereto, but otherwise to remain in full force and effect."

West Edmond Hunton Lime Unit, which is appellant in this case, and which is hereinafter referred to as the defendant, is the Unit created by the Oklahoma Corpo-

ration Commission in its order of July 29, 1947, made under the unitization statute above outlined, to operate the West Edmond Hunton Lime pool of oil and gas.

After the formation of the Unit defendant took over the operation of the pool. In view of the provision in the statute that the unit production allocated to each separately-owned tract should "for all intents, uses and purposes be regarded and considered as production from such separately-owned tract," and of the fact that plaintiffs gave no notice of termination of the division orders above referred to, defendant continued to deliver plaintiffs' share of the oil produced by the Unit to the Champlin Refining Company, and the other purchasers under the division orders executed by plaintiffs, just as it had previously delivered plaintiffs' share of the oil produced on plaintiffs' separately-owned tracts. It was stipulated by the parties that plaintiffs continued to be paid by the purchasers under the division orders for their portion of the oil so delivered (R. 114).

The Court will note from Appendix C that the contract price for the oil purchased under the division orders was "the price posted by the [purchaser] for the same kind and quality of oil in the particular field on the day when such oil is received." Throughout the year 1948, until September 28, the posted price of all purchasers in the field, including the purchasers under plaintiffs' division orders, was $2.65 per barrel.

On September 28, however, the Phillips Petroleum Company—which was not a purchaser under any of plaintiffs' division orders—posted a price of $3.00 per barrel and offered to buy oil at such price. Neither Champlin Refining Company, nor either of the other two companies purchasing the oil in the West Edmond field, met this price, and on December 17, 1948 Phillips reduced its price

to the $2.65 per barrel posted by the other purchasers (R. 112, 113).

During the period in which Phillips posted the higher price, a very few owners of royalty and operating interests in the Unit terminated their division orders with other purchasers, and negotiated new division orders with Phillips (R. 218, 225, 231, 236, 247, 266, 280, 283, 284). However, the interest owners so transferring to Phillips made up less than 1% of the total interest ownership in the Unit (R. 291, 292). The great majority of the interest owners, including the plaintiffs, left their division orders with the other purchasers in force through the entire period (R. 114).

In January, 1949 plaintiffs filed the present action, contending that the Unit, defendant herein, had been obligated under the unitization statute to take the unit production and sell it for the interest owners at the best price obtainable, and, accordingly, that when Phillips raised its price from $2.65 to $3.00, and the Unit failed to obtain the $3.00 price for its interest owners, it became indebted to them in the amount of 35¢ per barrel for all oil produced during the period of the increase and sold by them at the lower price. On this theory, plaintiffs prayed for judgment in the amount of $1,367, which was 35¢ per barrel for plaintiffs' share of the Unit oil during the period in question. They also asked that defendant be directed to make an accounting on a similar basis to all other royalty owners similarly situated (Petition, R. 4 to 13).

The case was tried in the District Court for Oklahoma County on September 27, 1950, most of the facts being stipulated. (See Stipulation, R. 108 to 209.) On November 28, 1950 the District Judge entered judgment for defendant, rejecting all plaintiffs' claims (R. 296).

Plaintiffs then appealed to the Supreme Court of Oklahoma (R. 309), and on June 15, 1954 that Court filed an opinion reversing the judgment of the trial court, and remanding the case to the trial court with directions to enter judgment for plaintiffs against defendant in the sum of $1,203.30, and also to enter judgment directing defendant to account to and pay all royalty owners similarly situated, on the basis of 35¢ per barrel for all oil produced and accruing to their respective interests, during the period in which Phillips posted the higher price.

To reach this result, the Oklahoma Supreme Court first held that unitization nullified the division orders, under which plaintiffs were obligated, until they should give notice of termination, to sell their royalty oil to the purchasers under such division orders at such purchasers' posted price. Thus, the Fourth Syllabus of the decision states: *

> "A division order signed by a royalty owner before the unit was created referring to his oil from his individual acreage then producing oil, is insufficient and ineffective to authorize the subsequently created unit to dispose of the royalty owners percentage share of the oil in the unit production, or of any of the unit oil, to a purchaser not paying the highest price available in the field."

The court made the above holding in spite of the fact that, as above stated, the unitization statute specifically provides that the part of unit production allocated to each separately owned tract "shall for all intents, uses and purposes be regarded and considered as production from

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* Under the Oklahoma practice, the syllabus is prepared by the court and states the points of law determined by the court, 12 Okl. Stat. § 977.

such separately owned tract"; and in spite of the fact that plaintiffs at the trial stipulated that the division orders "have been in full force and effect since the date of first production from plaintiffs' respective tracts," and that plaintiffs "have been paid for their proportionate part of production from said leases in accordance with said division orders."

After thus disposing of the division orders, the Oklahoma Supreme Court went on to hold that the defendant Unit became a trustee of the oil accruing to plaintiffs' interests, and as such was obligated to sell it at the highest possible price. In so holding, the court disregarded the express provision of the statute that the Unit should have no title to the unit production, and that it must deliver the proper allocated part thereof, in kind, to the interest owner entitled thereto, or to the purchaser from such interest owner.

2. How the Federal Question Is Presented.

Since the opinion of the Oklahoma Supreme Court was the first intimation that unitization had terminated the division orders, defendant on August 26, 1954 filed its Petition for Rehearing which appears on pages 348 through 378 of the record. While this Petition was, as a matter of presentation, divided into three parts, entitled respectively "Petition for Rehearing," "Brief in Support of Petition for Rehearing," and "Motion for Oral Argument," all three parts were filed as a single document, under a rule of court which permits only the filing of a "Petition for Rehearing," without mention of any supporting brief, and we submit that all three parts must be deemed to constitute the "Petition for Rehearing."

In the first part of this document, which was entitled "Petition for Rehearing," defendant included, as a ground for rehearing, the fact that "The Court erroneously nullified valid contracts" (R. 351).

In the part entitled "Brief in Support of Petition for Rehearing," defendant included a section entitled "The Court's Holding Violates the Federal Constitution." In this section, which appears on pages 374 and 375 of the record, defendant contended specifically that the unitization statute, as interpreted by the Oklahoma Supreme Court, violated the Constitution of the United States

(1) Because it impaired the obligation of the division orders in violation of Article I, Section 10;

(2) Because it deprived the holders of the division orders of their property without due process of law in violation of Section 1 of the Fourteenth Amendment; and

(3) Because it deprived defendant of property without due process of law in violation of Section 1 of the Fourteenth Amendment, by subjecting it to a liability which was never intended by law, and was never voluntarily assumed.

The above contentions raised the identical questions presented in our Notice of Appeal to this Court, and set forth on page 3 hereof as the "Questions Presented by the Appeal."

On September 28, 1954 the Petition for Rehearing was denied, without further comment, by the Oklahoma Supreme Court (R. 379).

While the federal constitutional questions in this case had been created by the decision of the Oklahoma Supreme Court, and the Petition for Rehearing was con-

sequently defendant's first opportunity to raise these questions, nevertheless, in view of the fact that the Petition for Rehearing had been denied by the Court without opinion, defendant desired to make it clear beyond question that the court had actually ruled on the federal constitutional questions. Accordingly, on November 8, 1954, defendant made application to the court for a certificate as to the existence of the federal question (R. 404). Thereafter, on December 13, 1954, the Court, with the concurrence of a majority of its judges, issued the "Certificate as to the Existence of Federal Question" which appears as Appendix D hereof, and ordered it made part of the record (R. 407). This certificate makes it clear that defendant, in its Petition for Rehearing,

> "* * * contended that the Unitization Statutes of the State of Oklahoma * * * as interpreted by this Court in its decision herein, impaired the obligation of the division orders and other contracts referred to herein in violation of Section 10 of Article I of the Constitution of the United States, and deprived the holders thereof of property without due process of law in violation of Section 1 of the Fourteenth Amendment thereof, and also contended that [defendant] was deprived of property without due process of law in violation of Section 1 of the Fourteenth Amendment by being subjected to a liability which was never intended by law and was never voluntarily assumed * * *."

The certificate further states:

> "that this Court regarded said contentions as properly before it on said Petition for Rehearing; that it became material to the determination of said petition to determine said contentions so made by [defendant], and that this Court in denying said petition for rehearing rejected said contentions."

3. The Federal Question Was Properly Raised.

Before the decision of the Oklahoma Supreme Court, there was no intimation in this case that unitization had terminated the division orders. Plaintiffs had taken no such position, either in their Petition (R. 4 to 13), or on trial. Indeed, they stipulated at the trial that the division orders "have been in full force and effect since date of first production from plaintiffs' respective tracts." The decision of the Oklahoma Supreme Court that the division orders were terminated was therefore completely unexpected, giving defendant no prior opportunity to anticipate or assert the federal questions here involved. In this situation, it was clearly sufficient for defendant to raise these federal questions for the first time in its Petition for Rehearing and it made no difference that such Petition was denied without opinion. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673 (1930); *Great Northern Railway Co. v. Sunburst Co.*, 287 U. S. 358 (1932).

We believe that we have already adequately shown that the federal questions were actually raised in defendant's "Petition for Rehearing," even though they were most fully set forth in the section thereof entitled "Brief." Any question on this point is resolved by the "Certificate as to the Existence of Federal Question," quoted above, which was concurred in by a majority of the court, and which shows affirmatively that the state court regarded defendant's federal constitutional contentions as properly presented to it in the Petition for Rehearing, and that, in denying the Petition for Rehearing, it rejected such contentions. See *Charleston Federal Savings & Loan Association v. Alderson*, 324 U. S. 182, 186 (1945).

4. The Judgment Appealed From is a Final Judgment.

In the judgment embodied in its decision herein, the Oklahoma Supreme Court determined with finality the right of plaintiffs to recover from defendant the damages which it sought, and remanded the case with directions to enter judgment for the plaintiffs against defendant in the amount of $1,203.30 (R. 347). Under these directions, the duty of the trial court to enter judgment in favor of plaintiffs for this amount was merely ministerial, and it is clear that the remand did not prevent the decision of the Oklahoma Supreme Court from being final. *Cole v. Violette,* 319 U. S. 581 (1943).

It is true that the Oklahoma Supreme Court also directed the trial court to require defendant to account to all other owners of royalty interests on the same basis reflected in the judgment in favor of plaintiffs. However, the interests of other royalty owners are clearly separable from the interests of plaintiffs, and the additional direction to account to such other owners was severable, and did not affect the finality of the judgment in a definite amount ordered in favor of plaintiffs. See *Clark v. Williard,* 292 U. S. 112 (1934), and *Radio Station WOW v. Johnson,* 326 U. S. 120 (1945).

THE FEDERAL CONSTITUTIONAL QUESTIONS HERE PRESENTED ARE SUBSTANTIAL.

1. The constitutional questions as to the division orders.

There is no question that the division orders executed by plaintiffs in 1943 in favor of various purchasers of oil were valid contracts. This is apparent both from the division orders themselves (see Appendix C), and from holdings of the Oklahoma Supreme Court. *Texas Co. v. Pettit,* 107 Okla. 247, 220 Pac. 956.

It is also unquestioned that the division orders were, by their express provisions, terminable only by the giving of notice to the oil purchasers thereunder, and that plaintiffs never gave such notice. As previously stated, the plaintiffs stipulated at trial that the division orders had at all times been in full force and effect, and that they had been paid thereunder for their proportionate share of the oil produced (R. 114).

We have always believed, and we argued to the Oklahoma Supreme Court, that the unitization statute should not be construed to terminate the division orders, but to retain them in effect—applying them, of course, to the proportion of unit production allocated to plaintiff's separately-owned tracts, rather than to oil actually produced from such separately-owned tracts. In support of this view, we cited to the court the portions of Section 286.10, above set forth, providing that the amount of the unit production allocated to each separately-owned tract should "*for all intents, uses and purposes**" be regarded and considered as production from such separately owned tract," and that all "property rights, leases *and other contracts*," should "meet the provisions" of the unitization act, "but otherwise * * * remain in full force and effect."

Despite these arguments, the Oklahoma Supreme Court construed the unitization statute to terminate the division orders.

It is true that the court did not—and in our opinion could not—point to any statutory language as sustaining its conclusion. However, it was clearly the impact of the statute which, in the opinion of the court, destroyed the division orders, and the failure of the court to find a

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* Emphasis ours throughout this Statement unless otherwise indicated.

specific statutory provision on which to base this result cannot negative the fact that it construed the statute to terminate the orders.

So construed, we believe that the statute impaired the obligation of these valid contracts in violation of Article I, Section 10, and deprived the parties thereto of their property without due process of law in violation of the Fourteenth Amendment.

We do not contend that the unitization statute of Oklahoma is unconstitutional in its general aspects. Its constitutionality was sustained by this Court in *Palmer Oil Corp. v. Amerada Corp.*, 343 U. S. 390 (1952)—a decision with which we heartily agree.

Nor do we deny that it was within the power of the Oklahoma Legislature to provide that division orders should be deemed modified, so as to apply thenceforth to the amount of unit production allocated to each separately-owned tract, rather than to actual production from such tract. The modification of the division orders to this extent was necessary in order to effectuate the purposes of unitization, and would certainly have been warranted by the police power. It is our view, as already indicated, that this is exactly what the Legislature intended, when it provided in Section 286.10 that the amount of unit production allocated to each separately-owned tract should "for all intents, uses and purposes be regarded and considered as production from such separately-owned tract," and that existing contracts should meet the provisions of the act, "but otherwise to remain in full force and effect."

What we do contend is that the unitization statute is unconstitutional to the extent that it is construed—as the Oklahoma Supreme Court construed it—to terminate completely the valid and subsisting division orders. Such

termination—which would wipe out the contractual rights of oil purchasers in a unitized field and would impose liability on units which had turned oil over to such purchasers in reliance on their supposed contractual rights —cannot be regarded, by any stretch of the imagination, as necessary to effectuate the ends of unitization, and cannot in any way be justified as an exercise of the police power.

The decision of this Court which shows most clearly both that this Court has jurisdiction of the present appeal, and that the decision appealed from is erroneous and should be reversed, is *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 (1938). In that case, a state's teachers' tenure law provided that any teacher who, after serving five years, entered into a contract with a school system for further service, should have permanent tenure, unless the contract was canceled for cause. The plaintiff was a teacher in the township school system who, after five years' service, had entered into such a contract for further service. Thereafter, the Legislature amended the teachers' tenure law so as to exclude township schools from its operation. Shortly afterwards, the plaintiff was dismissed, and, when she brought an action in mandamus to secure reinstatement, the state supreme court construed the amendment to the teachers' tenure law to terminate the plaintiff's contract.

The plaintiff appealed to this Court, which took jurisdiction of the appeal and held that the statute, as interpreted by the state court, was an impairment of the obligation of plaintiff's contract, which was not justified by the police power, and therefore violated Article I, Section 10. In the course of its opinion, this Court stated at page 108:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfill-

ment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end, and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality.

The causes of cancelation provided in the Act of 1927 and the retention of the system of indefinite contracts in all municipalities except townships by the Act of 1933 are persuasive that the repeal of the earlier act by the later was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed."

The *Treigle* and *Veix* cases, cited on page 3 hereof, also show the jurisdiction of this Court over the present appeal, although they do not furnish as close an analogy on their facts as does the *Brand* case.

It may be urged in the instant case that the West Edmond Hunton Lime Unit, defendant herein, does not have the standing to raise the constitutional questions as to the division orders, here presented, because it was not a party to such orders. However, while the Unit was not a party, it admittedly delivered plaintiffs' allocated portion of the unit oil to the purchasers under the division orders, in reliance on the division orders.

In the view of the state court, the Unit became a trustee of the royalty oil. As such "trustee," in reliance upon an apparently valid and binding contract, it delivered the oil for value to a purchaser who had no knowledge of any "trust." The purchaser got exactly what its contract called for, at the price stipulated in the contract, and had no further interest in enforcing its contractual rights. If,

at the time of the delivery, the contract was terminated by law, or was for any other reason ineffective, the Unit could not recover the oil, since title had been passed for value to a person without knowledge of any trust, and the delivery would have been under mistake of law. Furthermore, even if such recovery were legally possible, it would be totally impracticable.

Under these circumstances, it is clear that the Unit has an interest in the validity of the division orders—indeed, that it is the only person having such an interest. In this situation, the decisions of this Court show that the Unit has the standing to raise in this Court the present constitutional questions. See *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), and particularly the concurring opinion of Mr. Justice Frankfurter at page 154; and *Barrows v. Jackson*, 346 U. S. 249 (1953), at 255 et seq., and cases there cited.

We believe that the above sufficiently indicates the substantiality of the constitutional questions relating to the division orders, and the standing of the defendant Unit to present them. We wish to add that these questions are of considerable general importance, since, if the decision of the Oklahoma Supreme Court is left in effect, all units in Oklahoma which have delivered oil to purchasers in reliance on division orders executed before unitization—and we have no doubt that all such units have done so—will be subjected to large and totally unforeseeable liabilities.

2. The third constitutional question.

The third constitutional question in this case is directed to the decision of the state court as such, not to the unitization statute as construed by it. It is therefore a question which, if it stood alone, could be reviewed only by writ of certiorari.

The fact is that, when the state court construed the unitization statute in the instant case, it totally disregarded what the statute plainly said.

As heretofore pointed out, the statute expressly provided that the production allocated to each tract should "for all intents, uses and purposes" be considered as production from such tract; the state court refused so to consider it.

The statute expressly provided that all contracts should "remain in full force and effect"; the state court construed the statute to terminate the division orders.

The statute expressly provided that the Unit should have no title to the unit production, and that it must distribute such production in kind to the interest owners or the purchasers from them; the court construed the statute to mean that the Unit did take title to the unit production, and was required to sell it on the open market at the highest price obtainable.

In declaring division orders nullified by unitization, the state court disregarded not only the plain language of the statute, but also the plain language of the stipulation entered into by the parties. While that stipulation stated explicitly that the division orders "have been in full force and effect since date of first production" (R. 141) the state court held that they had terminated when unitization became effective.

Moreover, while the majority opinion of the state court correctly notes that the facts were not in dispute

between the parties, that opinion proceeds to state, as the controlling "facts" of the case, conclusions which are without the slightest support in the Record, and which are directly contrary to the actual facts. For example, the majority opinion refers to the period during which Phillips Petroleum Company was posting a price of $3.00 per barrel, and states that Phillips "continuously during said period offered to buy and bought from the unit and its operator a substantial portion of the oil produced from the unit area" at Phillips' posted price of $3.00. The majority opinion, noting that the defendant unit was in effect a trustee, states that "surely his duty to the royalty owners requires that he act with the highest fidelity when he purchases the oil as he did here." Again the majority opinion states that the acts of the defendant unit "resulted in unconscionable gain to the trustee at the direct loss to the royalty owners affected."

Thus the opinion pictures the defendant unit as a trustee who bought oil from royalty owners at $2.65 per barrel and sold it to Phillips at $3.00 per barrel, pocketing the difference of 35¢ as a secret profit. Not one of these "facts" is supported by so much as a scintilla of evidence. The fact is that the defendant unit has never bought or sold a single barrel of oil, either directly or indirectly, and the defendant unit has never profited by so much as one cent at the expense of any interest owner.

The extent to which the majority opinion erred in its view of the facts as well as in its conclusions of law is plainly stated in the dissenting opinion of Justice Williams, concurred in by Chief Justice Halley, which appears at pages 38 to 51 of Appendix A. Since the Record made in the trial court reflects no dispute concerning the facts of the case, it is obvious that the majority opinion chose to

disregard the undisputed facts in order to adopt conclusions of fact that would support its judgment.

By totally disregarding both the plain provisions of the unitization statute and the undisputed facts in the Record, the state court has imposed on the defendant unit a liability which, as stated in our notice of appeal, "was never intended by law and was never voluntarily assumed." Indeed, it would have been impossible for the state court to have achieved this result without completely disregarding both the statutes and the stipulated facts.

We realize that ordinary error by a state court does not constitute a deprivation of property without due process in violation of the Fourteenth Amendment. We submit, however, that the due process clause must impose some limit on the power, even of a court, to disregard statutes and stipulations, and to call black white.

While we know of no decision which has drawn such a line, this Court has indicated by way of dictum that the line might be drawn.

Thus in *American Railway Express v. Kentucky*, 273 U. S. 261 (1927), this Court, in refusing to apply the due process clause to overturn a judgment which the state court had had jurisdiction to render, stated at page 273:

> "We cannot interfere *unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'* "

Similarly in *O'Neil v. Northern Colorado Irrigation Co.*, 242 U. S. 20 (1916), Mr. Justice Holmes indicated, at page 26, that the due process clause might be violated in the event that a state court made "a perverse reading of the law."

We submit that, under the principle above indicated, the action of the state court in the instant case amounts to a violation of defendant's rights under the due process clause. We further submit that the constitutional question presented would be important enough to warrant the issuing by this Court of a writ of certiorari, even if it did not have jurisdiction on appeal.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Opinion of the Supreme Court of Oklahoma.

No. 35,316.

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA.

J. M. YOUNG AND KATE YOUNG,
Plaintiffs in Error,

vs.

WEST EDMOND HUNTON LIME UNIT,
a body politic and corporate,
Defendant in Error.

SYLLABUS.

1. When the Corporation Commission of Oklahoma, under authority of 52 O. S. Supp. 1949, § 286.1 et seq. entered its order unitizing a designated land area for oil production, it thereby created a corporate body with the duty and the exclusive authority to develop and produce the entire designated area as a single unit for the benefit jointly and severally of the various persons interested in oil production in the aggregate area, and with the duty to distribute the oil produced from the area to and among the various owners of mineral rights and interests in the land of the unit, according to the per centage of aggregate production allocated to each such owner out of such production. It is the duty of the unit organization to distribute such allocated per centage to each such owner in oil if desired, or the proceeds thereof determined at the highest market price available, in the absence of an agreement with any such respective owner for other disposition of his respective per centage share in the unit production.
2. Prior to unitization the lessor and lessee of any productive tract of land owned the specific oil produced there-

from and had the exclusive right to produce and dispose of oil from that tract for their own benefit to the exclusion of their neighbors who then had no rights or interests therein, but after unitization the exclusive right to manage such tract for oil purposes and the exclusive right to drill new wells and to produce new wells and old wells on that tract passed from the original tract lessor and lessee to the unit organization, and the management and the handling of production from such tract passed to the unit organization in trust for the persons entitled thereto per centage wise, subject of course to the duty of the unit organization to properly make accounting and delivery of per centages as allocated.

3. Unit operation of a producing oil field under unitization created or organized pursuant to state statute 52 O. S. Supp. 1949, § 286.1 et seq. is in the nature of an operation by a trustee and there is required a high degree of fidelity to all those entitled to receive fixed and stated per centages of the production or its proceeds.

4. A division order signed by a royalty owner before the unit was created referring to his own oil from his individual acreage then producing oil, is insufficient and ineffective to authorize the subsequently created unit to dispose of the royalty owners per centage share of the oil in the unit production, or of any of the unit oil, to a purchaser not paying the highest price available in the field.

5. A suit by a royalty owner against a unit for a loss sustained in the failure of the unit and its operator, during a certain period, to take or deliver unit production at the highest sale or market price available, presents a question of common or general interest to the other numerous owners of royalty interests in the separately-owned tracts of the unit and who in said period have not received their share of the unit production in kind, or the proceeds thereof measured by the highest prop-

erly available price. In such reason one or more of such royalty owners may sue for the benefit of all. 12 O. S. 1951, § 233.

Appeal from the District Court of Oklahoma County. Hon. Glen O. Morris, Judge

Action by J. M. Young and Kate Young for themselves, and for others of a class, against West Edmond Hunton Lime Unit, a body corporate. Judgment for defendant, and plaintiffs appeal.

REVERSED WITH DIRECTIONS TO ENTER JUDGMENT FOR THE PLAINTIFFS.

JOHN BARRY, La Jolla, California
WAYNE W. BAYLESS, Okla City, Okla.
For Plaintiffs in Error.

ROBINSON, SHIPP, ROBERTSON & BARNES, Okla City, Okla. and
GEORGE HAZLETT, Cleveland, Ohio,
For Defendant in Error.

WELCH, J.

The facts are not in dispute.

The plaintiffs owned the mineral interest and rights in a certain one-half section and a one-quarter section of land, (total 480 acres). The mineral interests in these lands, in respective separate tracts, were leased to Sohio Petroleum Company, Stanolind Oil and Gas Company, and Peppers Refining Company. The said lands became productive of oil and gas, and adjoining lands also became productive of oil and gas. The whole area of proven productivity (several thousand acres) thereafter became designated as the West Edmond Hunton Lime Field, and was ordered unitized by the Corporation Commission, and to be operated and produced as a single unit, by the unit organization, in accordance with a plan of unitization sub-

mitted by the lessees of the various tracts in the field. Under the order of the Corporation Commission, and the "unitization statutes" then existing, 52 O. S. Supp. 1949, § 286.1, et seq., the West Edmond Hunton Lime Unit, a body politic and corporate, was created as such unit organization. A committee, composed of the oil and gas lessees of the various separate tracts comprising the unitized area, and acting for the body corporate, selected Sohio Petroleum Company to operate and develop and produce the unitized area for the unit. This deprived the various lessees of any further right or authority or duty to operate their respective leased premises, or to produce oil therefrom.

Under the unitization plan, and according to law, a calculation was made of the potential productivity of each separate leasehold tract of land, and to each such tract there was allocated a stated per centage of all the oil to be produced by the unit organization from the whole area included in the unitization. That per centage was then divided seven-eights to the respective tract lessee, and one-eighth to the respective tract lessor and thus a specified per centage of the overall production of the entire unitized area was thereby allocated to each lessor and lessee in the area, without regard to where the oil was produced in the area.

Sohio Petroleum Company, Champlin Refining Company, Continental Oil Company and Phillips Petroleum Company were all purchasers of oil from the area at the beginning price of $2.65 per barrel. In the second year of the unit operation of the field, and during a period from September 28th to December 17th, the Phillips Petroleum Company, which had oil pipe lines or gathering lines throughout the unit area, posted a price of $3.00 per barrel for oil from the area, and continuously during said period offered to buy and bought from the unit and its operator a

substantial portion of the oil produced from the unit area at such posted price. During such time, however, there was sale of some oil produced from the unit area to other purchasing companies and some of the unit oil was taken by the unit operator himself at and for the price of $2.65 per barrel. During such period of time the percentage of production of the unit operation allocated to the royalty interest of the plaintiffs amounted to 3,438 barrels, and the plaintiffs received the proceeds from such an amount of oil at a price of $2.65 per barrel.

The plaintiffs, in pleading, alleged, in substance, the foregoing state of facts and averred that the defendant, as agent and trustee of the plaintiffs, and other similarly situated, violated a duty owed to the plaintiffs, and other similarly situated, in that it failed to obtain $3.00 per barrel for such oil as was produced from the unit and allocated to the plaintiffs, and such others, in the certain period from September 28th to December 17th, and that plaintiffs thereby suffered a loss, damage and detriment in a sum equal to 35¢ per barrel alleged in pleading to be applied to 3,620 barrels of oil, or a total sum of $1,367.00, (in evidence by stipulation the above figure corrected to be 3,438 barrels), and it was alleged that the other similarly situated as the plaintiffs suffered loss of 35¢ per barrel accordingly, as to their respective interests in the production of the unit in such period.

The plaintiffs prayed that they have money judgment against the defendant and that the court enter judgment directing the defendant to account to and pay to all persons similarly situated as plaintiffs, owning royalty interests in the oil produced from the unit, the sum equal to 35¢ per barrel applied to their respective percentage interests in the total barrellage of oil produced from the unit during the said period from September 28th to December 17th.

The defendant, by answer, averred that it never at any time was authorized to market any unit production; that the manner and method of sale and disposition of the plaintiffs' part of the production from the lands within the unit was governed and controlled by the terms of oil and gas leases and division orders executed by the plaintiffs prior to unitization, and that plaintiffs have been paid for all production purchased from them under the terms of said leases and previous division order; that the rights of other owners of mineral interests within the unit are not identical, and plaintiffs were without right to maintain the action as a class action.

In the oil and gas leases executed by the plaintiffs prior to unitization the lessees covenanted:

> "To deliver to the credit of lessor, free of cost, in the pipe line to which lessee may connect wells on said land, the equal one-eighth part of all oil produced and saved from the leased premises."

Prior to unitization the plaintiffs and their lessees, and assigns of their lessees, signed division orders addressed to an oil purchasing company wherein they each warranted their ownership in respective proportions of all of the oil produced from said certain described lands, and wherein they authorized the oil purchaser company, until further notice, to receive their individual oil from the said certain premises for purchase from the said parties severally in the proportions named. The plaintiffs were named as owners of a one-eighth of the total production from the described lands.

At the close of all the evidence in the case a motion of the defendant for judgment was sustained, and judgment was entered for the defendant.

The plaintiffs contend that the division orders signed by the royalty owners before the unit was created did not cover the royalty owners' fractional interest in the common pool or source of supply, and that the defendant as the producer of the oil from the common pool, and in the absence of express directions from the plaintiffs as to a disposition of their share of the unit production, was bound to take or sell the plaintiffs' share, and account to the plaintiffs therefor on a basis of a price per barrel of not less than the market price available at the time the oil was run or produced, which is to say, at the highest market price available.

The defendant contends that it was not at any time under any obligation to the plaintiffs to market the plaintiffs' share of the oil produced from the unit area. That in any event, it could not be held responsible to the plaintiffs for the price paid and received for the plaintiffs' share of the production in the circumstance that the plaintiffs had designated a particular purchaser for their share of the oil produced from their own land by the division orders signed by the plaintiffs before unitization.

Obviously, an authorization to receive individually owned oil for purchase from wells located on a particular tract of land by the owners of the oil produced therefrom is not an authorization to receive other oil elsewhere produced.

After unitization the plaintiffs were no longer entitled to one-eighth of the oil produced by their lessee from their 480 acres of land. Instead, they were entitled to receive the fixed and stated percentage (allocated to them) of all the oil produced by the unit operator from the entire unit of several thousand acres. This might have been more, or might have been less than the one-eighth of the oil

produced from their 480 acres, but at any rate, it was different from the oil they were entitled to receive under their original oil leases, and its sale was not governed by the original division orders which obtained while oil was produced wholly and solely from plaintiffs' land by plaintiffs' lessee.

Under the statutes, *supra,* authorizing unitized management of common sources of supply of oil, the owners of the mineral rights and interests in a particular tract of land are compelled to surrender all right to produce and take oil from the particular tract, and in lieu thereof they become entitled to a share in the total production by the unit organization from the common source of supply of which the particular tract is a part. Palmer Oil Corp v. Phillips Pet. Co. 204 Okla. 543, 231 P. 2d 997. And upon unitization the landowner lessors lost their right to have their contracted lessees develop and produce their individually owned acreage for the joint benefit of lessor and lessee, and instead the lessors looked to the unit organization to produce all acreage together as a single unit and to account to lessors for their allocated per centage of the aggregate unit production. Thus by statute when a tract of land becomes a part of a field brought under unitized management the owners of the mineral rights and interests in such particular tract lose the right to produce or control the disposition of the production from the particular tract and that right passes exclusively to the unit organization. It follows that any prior authorization as to receiving oil for purchase from the particular tract becomes a nullity.

The statutes under which the instant unitized management of a common source of supply was created provide that there be an apportionment of the unit production

among the separately owned tracts within the unit. The statute provides in part as follows:

Sec. 286.9 provides:

"Each unit created under the provisions of this Act shall be a body politic and corporate, capable of suing, being sued and contracting as such in its own name. Each such unit shall be authorized on behalf and for the account of all the owners of the oil and gas rights within the Unit area, without profit to the unit, to supervise, manage and conduct the further developments and operations for the production of oil and gas from the unit area. * * *

* * *

"A one-eighth (⅛) part of the unit production allocated to each separately owned tract shall in all events be regarded as royalty to be distributed to and among, or the proceeds thereof paid to, the royalty owners free and clear of all unit expense and free of any lien therefor."

The plan of unitization herein adopted provides the unit expense is to be paid from the share of the unit production that would otherwise go to the various lessees of the separately owned tracts within the unit. The plan of unitization contains a provision as follows:

"To the extent that any person entitled to take and receive in kind any portion of the Unit Production shall fail to take and receive the same currently as and when produced, the Unit Operator, as agent and for the account and at the expense of such person, is authorized to market and sell or itself purchase, at *not less* than the market price prevailing at the time of such sale, the portion of Unit Production not so taken in kind by the person entitled to take and receive the same. Proceeds of the Unit Production so sold, or purchased by the Unit Operator, shall be paid by the Unit Operator to the person or persons

for whose account the same is so marketed." (Emphasis added.)

The unit organization with its operator stands in a position similar to that of a trustee for all who are interested in the oil production either as lessees or royalty owners. The law applicable to this unitization required no notice to royalty owners, and afforded them no voice in the organization or management of the unit or in the selection of the unit operator.

In *Magruder v. Drury*, 235 U. S. 106, 120, 59 Law ed. 151, 156, it was said:

"It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity. 'It therefore prohibits a party from purchasing on his own account that which his duty or trust required him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells.' Michoud v. Girod, 4 How. 503, 555, 11 L. ed. 1076, 1099."

In *Brunn v. Hanson*, 103 Fed. 2d 685, 698, it was said:

"Among various duties of trustees, there is a general one described in 65 C. J. 652 § 520, as follows: 'In administering the trust, the trustee must act for the beneficiaries, and not for himself in antagonism to the

interests of the beneficiaries; he is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the cestui que trustent, and from placing himself in any position where his self-interest will, or may, conflict with his duties as trustee, as a trustee is required to protect at all hazards, even to his own personal loss or disadvantage, the estate under his administration where his personal and individual interests conflict with those of the trust estate; and where a trustee uses trust property for his own personal advantage, plenary relief may be granted. * * *

"One of the commonest illustrations where a conflict of interest appears, is a sale of trust property to the trustee individually. In such situations, the trustee should be attempting to sell the property for as much as possible to benefit the trust estate, while at the same time, as an individual, he probably would be attempting to buy the property for as little as possible. * * *"

In many instances by these rules a trustee is positively forbidden to buy the trust property. In the case at bar we have seen by the quoted statute that the trustee is specifically authorized to purchase oil produced, but surely his duty to the royalty owners requires that he act with the highest fidelity when he purchases the oil as he did here.

It is fairly shown, and as we understand, is not denied that the unit operator and the unit operating committee knew that the price of $3.00 per barrel was fully available and that various royalty owners were paid at that rate, while the oil interests of these involved royalty owners were purportedly purchased and they were paid at the rate of $2.65 per barrel. With this knowledge by the trustees, these royalty owners were not notified of this higher price available. Surely these acts were not in

keeping with the duty of the trustee, and fell far short of the high duty owed by the trustee, and resulted in unconscionable gain to the trustee at the direct loss to the royalty owners affected.

We hold the statutes require the operator of the unit, in this case, the defendant, to account to all the owners of oil rights within the unit area for their respective portions or percentages of the unit production at the highest market price available at the time of such production under the circumstances that such owners have not received in kind their share of such production, or have not expressly authorized the unit or the operator for the unit to deliver same to a particular purchaser.

Under the circumstances in proof herein, and undisputed, we hold the plaintiffs are entitled to a recovery against the defendant in the amount of $1,203.30, and costs of this action.

The plaintiffs contend they are entitled to maintain this action for the use and benefit of all other owners of oil royalty rights within the unit and similarly situated as the plaintiffs.

It was stipulated by the plaintiffs and the defendant that only the usual lessor's or landowner's ⅛th royalty on oil produced from the unit tracts is involved in this controversy. It was demonstrated in the evidence that there are several hundred royalty owners in similar situations as the plaintiffs. That they were entitled to an allocated per centage share of the production from the unit area during the period that Phillips Petroleum Company was buying and offering to buy oil from the unit area at $3.00 per barrel. They, too, were only paid at the rate of $2.65 per barrel, and, like the plaintiffs here, they had not authorized the unit to deliver their percentage share of the unit oil to any certain purchaser of oil.

12 O. S. 1951, § 233, provides:

"When the question of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

In *State, ex rel. Tharel vs. Board of County Com'rs of Creek County,* 188 Okla. 184, 107 P. 2d 542, with reference to the statute, supra, this court held that a class action was proper against certain tax payers, "because of their number, the similarity of their situation, and their common interest in the question involved and in the result of the action."

Herein, there appears to be a complete similarity of the situation of the plaintiffs, royalty owners, and numerous others, owners of royalty interests within the unit. The legal questions raised in this action are of common or general interest to the many owners of royalty interests within the unit, and the character of the relief sought appears to be applicable to all. In these circumstances we hold the case is one falling within the provisions of the statute, supra, authorizing one to sue for the benefit of all.

For reasons hereinabove stated, the judgment of the trial court is reversed. The cause is remanded, and the trial court is directed to enter judgment for the plaintiffs and against the defendant for the sum of $1,203.30, and to enter judgment directing the defendant to account to and pay all persons owning royalty interests on oil produced from the unit tracts involved herein during the time period involved herein, from September 28th to December 17th, such sums, respectively, that each of said royalty owners shall have received in proceeds for their

percentage of the oil produced in said period a sum equal to $3.00 per barrel for said oil.

JOHNSON, *V.C.J.* and CORN, ARNOLD and O'NEAL, *JJ.* concur

HALLEY, *C.J.* and BLACKBIRD, *J.* dissent

WILLIAMS, *J.* concurs in result but dissents as to class action feature.

Order of the Supreme Court of Oklahoma, October 29, 1954.

(No. 35,316—caption omitted.)

It is hereby ordered that the vote shown on the opinion filed in the above styled and numbered case on June 15, 1954, be and it is changed to read as follows:

CONCUR: Johnson, V.C.J., and Corn, Arnold & O'Neal, JJ;

DISSENT: Halley, C.J., and Williams & Blackbird, JJ.

DONE BY ORDER OF COURT IN CONFERENCE this 29th day of October, 1954.

HARRY L. S. HALLEY,
Chief Justice.

Dissenting Opinion of the Supreme Court of Oklahoma, October 30, 1954.

(No. 35,316—Caption Omitted.)

WILLIAMS, *J.*, (dissenting)

I am of the opinion that the majority opinion incorrectly states both the facts and the law applicable thereto and I am therefore unable to concur therein.

Plaintiffs are the owners of certain mineral interests in 480 acres of land in the West Edmond Hunton Lime Field. Plaintiffs' interests in these lands were leased to

Sohio Petroleum Company, Stanolind Oil & Gas Company and Peppers Refining Company, respectively, in separate tracts. The whole field, consisting of several thousand acres, was unitized under the provisions of House Bill No. 339, enacted by the Twentieth Session of the Oklahoma Legislature (title 52, Chap. 3b, Sess. Laws 1945; 1949 Suppl. to 52 O. S. 1941, § 286.1 et seq.), hereinafter referred to as the Unitization Act. This act was repealed by the legislature in 1951, but it was in full force and effect through the period with which this lawsuit is concerned. As a result of the unitization of this field in accordance with the provisions of the Unitization Act, the defendant, West Edmond Hunton Lime Unit, a body politic and corporate, was created as the unit organization. The general powers of the defendant unit, as prescribed by the Unitization Act and the plan of unitization adopted and approved by the Corporation Commission, consist of the authority on behalf and for the account of all *the lessees* within the unit area, without profit to the unit, to supervise, manage and conduct the further development and operation of the unit area for the production of oil and gas. The powers of the defendant unit are actually carried out by its operating committee, composed of one representative designated by each lessee within the unit area. The defendant unit's operations are supervisory and administrative only, however, and the actual physical operation of the field is carried on by the unit operator. Under the approved plan of unitization, Sohio Petroleum Company was designated as unit operator and acted as such operator throughout the period in question here. The importance of this point will be brought out later, and it should be borne in mind in connection therewith that Sohio Petroleum Company is not a party to the action. This

operation by Sohio was in accordance with the provisions of the Unitization Act which provides that as to the unitization plan "the actual operations within the unit area may be carried on in whole or in part by the several lessees of leases within the unit area, subject to the supervision and direction of the unit, or may be conducted in whole or in part by the unit or some particular operator or operators of a lease or leases in the approved unit area depending upon what is most beneficial or expedient."

The facts in this case are not in controversy and are for the most part stipulated. It is necessary to set them out, however, for a complete understanding of the issues involved.

On January 14, 1942, plaintiffs executed an oil and gas lease to A. Gutowsky covering 80 acres of land involved here. This lease contains the following provision for royalty payments:

> "To deliver to the credit of lessor, free of cost, in the pipe line to which lessee may connect wells on said land, the equal one-eighth part of all oil produced and saved from the leased premises."

After production of oil was obtained under this lease and on August 10, 1943, a contract was entered into by the plaintiffs and other parties owning the oil produced wherein they agreed to sell such oil to Champlin Refining Company. The contract, or division order, set out all the terms and conditions of the sale. Champlin Refining Company is specifically designated as the purchaser; the term of the sale is from the date of the first oil run until further notice, and the price to be paid is designated as the price posted by the Champlin Refining Company on the day when such oil is received by Champlin Refining Company. It was specifically stipulated by the parties hereto that

this lease and division order have been in full force and effect since the date of first production from plaintiffs' land. After unitization of this field was completed on November 18, 1947 Champlin continued to purchase the oil allocated to plaintiffs' land and plaintiffs have been paid for their share of the allocated oil in accordance with the division order to Champlin Refining Company, by Champlin checks accompanied by run statements for the period covered by each check. The situation with respect to the rest of plaintiffs' land was the same as that of the 80 acres hereinabove set forth except for minor differences in dates and parties.

Throughout the period of time in question, Sohio Petroleum Company, Champlin Refining Company, Continental Oil Company and Phillips Petroleum Company were all purchasers of crude oil, in the West Edmond Field under contracts with various royalty and working-interest owners. At all times material herein the market price posted by all such purchasers was $2.65 per barrel, except that from September 28, 1948, to December 17, 1948, Phillips Petroleum Company posted and paid a price of $3.00 per barrel for the oil purchased by it. Thereafter Phillips returned to the $2.65 per barrel price.

Defendant has never entered into any lease, contract, or division order with plaintiffs nor solicited the execution of such lease, contract or division order. Plaintiffs have at no time sought to rescind, terminate or modify the lease and division order executed by them and at no time sought to have their share of the oil produced sold to anyone other than the purchaser they had designated in the division order. During the period in which Phillips Petroleum Company posted a higher price than the other purchasers, some royalty owners in the field terminated their contracts with other purchasers by giving notice thereof and entered

into new contracts with Phillips Petroleum Company whereby they agreed to sell their share of the oil produced to Phillips and Phillips agreed to purchase the same, but plaintiffs were not among such royalty owners.

The majority opinion holds that defendant was a trustee for plaintiffs, was specifically authorized to purchase oil produced, did purchase oil and that its duty to plaintiffs required it to act with the highest fidelity. It further holds that the statutes require the unit operator (which the opinion says is the defendant in this case) to account to all the owners of oil rights within the unit area for their respective portions or percentages of the unit production at the highest market price available at the time of such production. I find there is simply no basis either in fact or law for such a holding. So far as the record in this case reveals, the defendant has never at any time either bought or sold a single drop of oil, either the plaintiffs' or anyone else's. The defendant is not even authorized to buy or sell oil except under certain very restricted circumstances, which circumstances do not exist and have never existed in the case at bar. It is true that the unit operator, Sohio Petroleum Company, is one of the purchasers of crude oil from the field, but Sohio is not the defendant in this case and is not even a party. Furthermore, the record does not reveal that Sohio ever bought one drop of plaintiffs' oil at any price. All Sohio did was to deliver plaintiffs' share of the oil produced to the purchaser designated by plaintiffs, to-wit: Champlin Refining Company, and Champlin Refining Company paid plaintiffs direct the agreed purchase price for said oil.

In order to better understand the situation existing here, it is necessary to set out certain portions of the unitization act and the unitization plan approved for this field which are particularly pertinent.

Section 10 of the Unitization Act is as follows:

"Property rights, leases and other contracts, and all rights and obligations shall meet the provisions and requirements of this Act and to any valid and applicable plan of unitization or order of the Commission made and adopted pursuant hereto, but otherwise to remain in full force and effect.

"Nothing contained in this Act shall be construed to require a transfer to or vesting in the unit of title to the separately-owned tracts or leases thereon within the unit area, other than the right to use and operate the same to the extent set out in the plan of unitization; nor shall the unit be regarded as owning the unit production. The unit production and the proceeds from the sale thereof shall be owned by the several persons to whom the same is allocated under the plan of unitization. All property, whether real or personal, which the unit may in any way acquire, hold or possess shall not be acquired, held or possessed by the unit for its own account but shall be so acquired, held and possessed by the unit for the account and as agent of the several lessees and shall be the property of such lessee as their interests may appear under the plan of unitization, subject, however, to the right of the unit to the possession, management, use or disposal of the same in the proper conduct of its affairs, and subject to any lien the unit may have thereon to secure the payment of unit expense.

"The amount of the unit production allocated to each separately-owned tract within the unit, and only that amount, regardless of the well or wells in the unit area from which it may be produced, and regardless of whether it be more or less than the amount of the production from the well or wells, if any, on any such separately-owned tract, shall for all intents, uses, and purposes be regarded and considered as production from such separately-owned tract, and, except as may be otherwise authorized in this Act, or in the plan of

unitization approved by the Commission, shall be distributed among or the proceeds thereof paid to the several persons entitled to share in the production for such separately-owned tract in the same manner, in the same proportions, and upon the same conditions that they would have participated and shared in the production or proceeds thereof from such separately-owned tract had not said unit been organized, and with the same legal force and effect. If adequate provisions are made for the receipt thereof, the share of the unit production allocated to each separately-owned tract shall be delivered in kind to the persons entitled thereto by virtue of ownership of oil and gas rights therein or by purchase from such owners subject to the right of the unit to withhold and sell the same in payment of unit expense pursuant to the plan of unitization, and subject further to the call of the unit on such portions of the gas for operating purposes as may be provided in the plan of unitization.

"Operations carried on under and in accordance with the plan of unitization shall be regarded and considered as a fulfillment of and compliance with all of the provisions, covenants, and conditions, express or implied, of the several oil and gas mining leases upon lands included within the unit area, or other contracts pertaining to the development thereof, insofar as said leases or other contracts may relate to the common source of supply or portion thereof included in the unit area. Wells drilled or operated on any part of the unit area no matter where located shall for all purposes be regarded as wells drilled on each separately-owned tract within such unit area."

The approved plan of unitization, which in effect constitutes the character under which defendant operates, contains provisions identical with the statutory provisions above set forth, and in addition contains the following pertinent provisions:

"Except as may be otherwise authorized or provided in this plan of unitization, and provided adequate provisions are made for the receipt thereof, the share of the unit production allocated to each separately owned tract shall be delivered in kind to the persons entitled thereto by virtue of ownership of oil and gas rights therein or by purchase from such owners, subject, however, to the right of the unit operator to withhold and sell the same in payment of unit expense pursuant to this plan of unitization, * * *

"To the extent that any person entitled to take and receive in kind any portion of the unit production shall fail to take and receive the same currently as and when produced, the unit operator, as agent and for the account and at the expense of such person, is authorized to market and sell or itself purchase at not less than the market price prevailing at the time of such sale or purchase, the portion of unit production not so taken in kind by the person entitled to take and receive the same. Proceeds of the unit production so sold or purchased by the unit operator, shall be paid by the unit operator to the person or persons for whose account the same is so marketed."

Thus it may be seen that the defendant unit is only authorized to sell oil produced from the unit when necessary to do so in order to effect collection of the unit operating expense. By the terms of the plan of unitization, however, only the ⅞ths working-interest of the lessees is subject to such sale and plaintiffs' ⅛th royalty is not subject to any expense of operation or to be sold for such expense. The defendant unit therefore has no authority to effect any sale of plaintiffs' share of the unit production whatsoever. And, of course, the record reveals that defendant never made or attempted to make any such sale. Of course, the plan of unitization does authorize the unit

operator (who is not a party to this suit) to market and sell or itself purchase that portion of the unit production which the person entitled to take and receive fails to take and receive when produced. However the record reveals that the unit operator made no such sales and the contingency under which it was authorized to make such sales never arose. Furthermore, if such contingency had arisen and such sale had actually been made, all the unit operator would have had to account to the royalty owners for would have been the market price prevailing at the time of such sale. The majority opinion erroneously places the onerous duty on the operator of obtaining the *highest* market price available, but it is unable to point out any statute, agreement, lease, division order or anything in the unitization plan or order which would entitle plaintiffs to more than the *prevailing* market price if their share of the production had in fact been sold by or purchased by the unit operator. It should be obvious that the prevailing market price is by no means necessarily the highest price available. A discussion of this point is really immaterial, however, since the unit operator is not a party to this action and since the record reveals that neither the unit operator nor the defendant unit ever sold or marketed any of plaintiffs' share of the unit production nor were they ever authorized to do so under the conditions shown to exist during the period in question under the applicable statutes and plan of unitization. Obviously, then, the majority opinion is in error in stating that the defendant was authorized to purchase oil produced, in stating that the defendant did purchase such oil, in stating that gain resulted to the defendant and loss to plaintiffs, and in stating that the defendant must account for all production at the highest market price available.

Although the record reveals that plaintiffs entered into a contract in the form of a division order with Champlin Oil Refining Company for the sale of plaintiffs' share of the oil, which contract was at all times carried out, the majority opinion holds that the unitization of the field nullified this division order solely on the ground that a division order which applied to oil produced from a particular tract of land could not apply to a percentage of the oil produced from the entire unit area. In this connection the majority opinion states:

> "Obviously, an authorization to receive individually owned oil for purchase from wells located on a particular tract of land by the owners of the oil produced therefrom is not an authorization to receive other oil elsewhere produced."

This holding is made in the face of a written stipulation entered into by the parties hereto and shown in the record in pertinent part as follows:

> "6. The division order attached hereto and marked exhibit 'D' *is a form of division order executed by plaintiffs covering their proportionate part of the production from said unit* * * *
>
> "7. The oil and gas lease and division order, respectively marked exhibit 'C' and 'D,' or like instruments containing similar provisions provided for and directed the manner of payment for plaintiffs' proportionate part of the production from said leases *and said orders have been in full force and effect since date of first production from plaintiffs' tracts.*" (Emphasis added.)

Not only does the majority opinion disregard and nullify the stipulation of the parties hereto, but it completely ignores the applicable provisions of the unitization statute and the approved plan of unitization. These division or-

ders were maintained in force by the express provisions of the statute, as witness the following pertinent parts of section 10 of the unitization act:

> "*Property rights, leases and other contracts, and all rights and obligations* shall meet the provisions and requirements of this Act and to any valid and applicable plan or order of the commission made and adopted pursuant hereto, but *otherwise to remain in full force and effect* * * *
>
> "*The amount of the unit production allocated to each separately-owned tract* within the unit, and only that amount, regardless of the well or wells in the unit area from which it may be produced, and regardless of whether it be more or less than the amount of the production from the well or wells, if any, on any such separately-owned tract, *shall for all intents, uses and purposes be regarded and considered as production from such separately owned tract,* and * * * shall be distributed among or the proceeds thereof paid to the several persons entitled to share in the production for such separately-owned tract *in the same manner, in the same proportions, and upon the same conditions that they would have participated and shared in the production or proceeds thereof from such separately-owned tract had not said unit been organized,* and with the same legal force and effect * * *
>
> "Operations carried on under and in accordance with the plan of unitization shall be regarded and considered as a fulfillment of and compliance with all the provisions, covenants and conditions, express or implied, of the several oil and gas mining leases upon lands included within the unit area, *or other contracts pertaining to the development thereof,* * * *. Wells drilled or operated on any part of the unit area no matter where located *shall for all purposes be regarded as wells drilled on each separately-owned tract within such unit area.*" (Emphasis added.)

It is well settled that a division order is a contract. *Texas Co. v. Pettit*, 107 Okla. 247, 220 P. 956. It should therefore be obvious that the division order executed by plaintiffs falls squarely within the above quoted provisions of the statute and was at all times in full force and effect. Furthermore, in every case heretofore considered by this court involving the effect of unitization it has been uniformly held that in interpreting contracts the allocated oil shall be "for all purposes" substituted for and considered as oil produced from the leased premises and that a well drilled anywhere on the unitized premises is for all purposes a well drilled on the leased premises. *Blevins v. Harris*, 172 Okla. 90, 44 P. 2d 112; *Godfrey v. McArthur*, 186 Okla. 144, 96 P. 2d 322; *McClain v. Harper*, 206 Okla. 437, 244 P. 2d 301.

The majority opinion is further erroneous in that it declares defendant to be a trustee owing the highest fidelity to plaintiffs. Such a holding is squarely contrary to our previous holdings. It is readily apparent from the foregoing quotations that the effect of the unitization of this field was to merely substitute the unit operator for the various lessees of the separate tracts in the unit in the physical operation of the leases. In *Burger v. Rogers*, 188 Okla. 620, 112 P. 2d 361, we held that there was no fiduciary relationship between lessor and lessee, saying:

> "The defendants were merely lessees under an oil and gas mining lease and were under no obligation to the plaintiff, other than to pay the rent and royalty provided in said lease, and if they breached this duty then their liability was purely a contractual one *and* in no sense *fiduciary*." (Emphasis added.)

The limitations of time and space do not permit a more detailed analysis of the erroneous nature of the majority

holding, but at least one more point should be mentioned, at least briefly, before closing.

The majority opinion holds that plaintiffs, who are merely two out of several thousand royalty owners in the field, are entitled to maintain this action for the use and benefit of all other owners of oil royalty rights within the unit and similarly situated as plaintiffs, and proceeds to enter a judgment "directing defendant to account to and pay all persons owning royalty interests on oil produced from the unit tracts involved herein during the time period involved herein, from September 28th to December 17th, such sums, respectively, that each of said royalty owners shall have received in proceeds for their percentage of the oil produced in said period a sum equal to $3 per barrel for said oil."

To my mind such a judgment is erroneous. It grants a money judgment to a large group of unidentified persons who are not before the court without regard to whether they desire such a judgment or not and without any individual pleading of the separate cause of action of the real parties in interest and without proof or authority or any evidence on which to base such a judgment being presented. It is elementary that the rights of the various royalty owners in the field are dependent upon the individual contracts that they have entered into. The majority opinion states that there appears to be a complete similarity of the situation of the plaintiffs and numerous other owners of royalty interest within the unit. I am unable, however, to ascertain the source of this appearance of similarity from the record before us. The only similarity that I can discover from the record is that there appear to have been a number of other royalty owners who sold their share of the production to purchasers other than Phillips.

We are not advised under what conditions any of such sales were made, however, with the exceptions of plaintiffs' sale to Champlin. It does appear from the record that some royalty owners had sold exclusive options to purchase their share of the production to certain pipe-line companies. Obviously such persons would not be in the same situation as plaintiffs. It further appears that some royalty owners have entered into division order contracts which require 30 days notice of termination before either party may withdraw therefrom. Obviously these persons are not in the same situation as plaintiffs. It also appears that some royalty owners requested a transfer of the sale of their share of the production to Phillips and that others did not. Numerous other distinctions could be noted, but the point to be made is simply that the claim of each individual royalty owner, if any he may have and care to assert, is dependent upon the factual situation prevailing in his particular case and in no wise dependent in any manner upon plaintiffs' recovery or lack of recovery. Defenses of estoppel, ratification, laches, or the statute of limitations might be successfully asserted against some royalty owners and not against others.

I am unable to concur in the majority opinion in any respect, and therefore respectfully dissent.

I am authorized to state that Mr. Chief Justice Halley concurs with the views herein expressed.

APPENDIX B.

Unitization Statute of the State of Oklahoma.

(52 O. S. Supp. 1949, Sec. 286.1 *et seq.*)

Sec. 286.1. *Legislative declaration.*

The Legislature finds and determines that it is desirable and necessary, under the circumstances and for the purposes hereinafter set out, to authorize and provide for unitized management, operation and further development of the oil and gas properties to which this Act is applicable, to the end that a greater ultimate recovery of oil and gas may be had therefrom, waste prevented, and the correlative rights of the owners in a fuller and more beneficial enjoyment of the oil and gas rights, protected. Laws 1945, p. 162, Sec. 1.

Sec. 286.2. *Common sources of supply to which act is applicable.*

This Act shall apply only to common sources of supply of oil, oil and gas, or gas distillate in this State.

The provisions of this Act shall not apply to any common source of supply of oil, oil and gas, or gas distillate or any part or parts thereof which at the effective date of this Act are being operated by or under pressure maintenance, repressuring, or secondary recovery methods or operations, provided, that nothing contained in this Act shall prevent the voluntary inclusion and extension of areas in which are located such existing pressure maintenance, repressuring, or secondary recovery methods or operations as unit areas under the provisions of this Act. Provided this Act shall not apply to any field where the discovery well has been drilled twenty (20) years prior to the effective date of this Act. Laws 1945, p. 162, Sec. 2.

Sec. 286.3. *Jurisdiction of corporation commission.*

Subject to the limitations of this Act the Corporation Commission of the State of Oklahoma, hereinafter referred to as the "Commission," is hereby vested with jurisdiction, power and authority, and it shall be its duty, to supervise the administration of this Act. Laws 1945, p. 163, Sec. 3.

Sec. 286.4. *The petition for and order creating unit.*

If upon the filing of a petition therefor and after notice and hearing, all in the form and manner and in accordance with the procedure and requirements hereinafter provided, the Commission shall find (a) that the unitized management, operation and further development of a common source of supply of oil and gas or portion thereof is reasonably necessary in order to effectively carry on pressure-maintenance or repressuring operations, cycling operations, water flooding operations, or any combination thereof, or any other form of joint effort calculated to substantially increase the ultimate recovery of oil and gas from the common source of supply; and (b) that one or more of said unitized methods of operation as applied to such common source of supply or portion thereof are feasible, will prevent waste and will with reasonable probability result in the increased recovery of substantially more oil and gas from the common source of supply than would otherwise be recovered; and (c) that the estimated additional cost, if any, of conducting such operations will not exceed the value of the additional oil and gas so recovered; and (d) that such unitization and adoption of one or more of such unitized methods of operation is for the common good and will result in the general advantage of the owners of the oil and gas rights within the common source of supply or portion thereof directly af-

fected, it shall make a finding to that effect and enter an order approving the creation of a unit composed of the lessees and other persons who under the plan of unitization approved by the Commission are chargeable with the responsibility and cost of conducting such unitized methods of operation, development of the common source of supply or portion thereof described in the order, all upon such terms and conditions, as may be shown by the evidence to be fair, reasonable. equitable and which are necessary or proper to protect, safeguard, and adjust the respective rights and obligations of the several persons affected, including royalty owners, owners of overriding royalties, oil and gas payments, carried interests, mortgagees, lien claimants and others, as well as the lessees. To give the Commission jurisdiction hereunder, the petition shall be filed by, or with the authority of, lessees of record of fifty percent (50%) or more of the area of the common source of supply or portion thereof sought to be unitized. The petition shall set forth a description of the proposed unit area with a map or plat thereof attached, must allege the existence of the facts required to be found by the Commission as hereinabove provided and shall have attached thereto a recommended plan of unitization applicable to such proposed unit area and which the petitioners consider to be fair, reasonable and equitable. Laws 1945, p. 163, Sec. 4.

Sec. 286.5. *Unit area and plan of unitization.*

The order of the Commission shall define the area of the common source of supply or portion thereof to be included within the unit area and prescribe with reasonable detail the plan of unitization applicable thereto.

Each unit and unit area shall be limited to all or a portion of a single common source of supply. Only so

much of a common source of supply as has reasonably been defined by actual drilling operations may be so included within the unit area.

A unit may be created to embrace less than the whole of a common source of supply only where it is shown by the evidence that the area to be so included within the unit area is of such size and shape as may be reasonably required for the successful and efficient conduct of the unitized method or methods of operation for which the unit is created, and that the conduct thereof will have no material adverse effect upon the remainder of such common source of supply.

The plan of unitization for each such unit and unit area shall be one suited to the needs and requirements of the particular unit dependent upon the facts and conditions found to exist with respect thereto. In addition to such other terms, provisions, conditions and requirements found by the Commission to be reasonably necessary or proper to effectuate or accomplish the purpose of this Act, and subject to the further requirements hereof, each such plan of unitization as the parties thereto may agree upon shall be fair, reasonable and equitable, and among other proper and equitable provisions, shall provide:

(a) For the efficient unitized management or control of the further development and operation of the unit area for the recovery of oil and gas from the common source of supply affected. Under such a plan the actual operations within the unit area may be carried on in whole or in part by the several lessees of leases within the unit area, subject to the supervision and direction of the unit, or may be conducted in whole or in part by the unit or some particular operator or operators of a lease or leases in the approved unit area dependent upon what is most beneficial

or expedient. The designation of the operator shall be by vote of the lessees in the unit in a manner provided in the plan of unitization and not by the Commission.

(b) The division of interest or formula for the apportionment and allocation of the unit production, among and to the several separately-owned tracts within the unit area such as will reasonably permit persons otherwise entitled to share in or benefit by the production from such separately-owned tracts to produce or receive, in lieu thereof, their fair, equitable and reasonable share of the unit production or other benefits thereof. A separately-owned tract's fair, equitable, and reasonable share of the unit production shall be measured by the value of each such tract for oil and gas purposes and its contributing value to the unit in relation to like values of other tracts in the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on structure, its probable productivity of oil and gas in the absence of unit operations, the burden of operation to which the tract will or is likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, or operating factors, as may be reasonably susceptible of determination. Unit production as that term is used in this Act shall mean and include all oil and gas produced from a unit area from and after the effective date of the order of the Commission approving the creation of the unit regardless of the well or tract within the unit area from which the same is produced.

(c) The manner in which the unit and the further development and operation of the unit area shall or may be financed and the basis, terms and conditions on which the cost and expense thereof shall be apportioned among and assessed against the tracts and interests made charge-

able therewith, including a detailed accounting procedure governing all charges and credits incident to such operations. Upon and subject to such terms and conditions as to time and rate of interest as may be fair to all concerned, reasonable provisions shall be made in the plan of unitization for carrying or otherwise financing lessees who are unable to meet their financial obligations in connection with the unit.

(d) The procedure and basis upon which wells, equipment and other properties of the several lessees within the unit area are to be taken over and used for unit operations, including the method of arriving at the compensation therefor, or of otherwise proportionately equalizing or adjusting the investment of the several lessees in the project as of the effective date of unit operations.

(e) For the creation of an operating committee to have general overall management and control of the unit and the conduct of its business and affairs and the operations carried on by it, together with the creation or designation of such other subcommittees, boards or officers to function under authority of the operating committee as may be necessary, proper or convenient in the efficient management of the unit, defining the powers and duties of all such committees, boards or officers and prescribing their tenure and time and method for their selection. Each lessee within the unit area shall be entitled to representation on the operating committee and shall have a vote equal to the proportionate interest of such lessee in the unit, provided, where the voting interest of a lessee is such as to control the action taken by the committee, the vote of such lessee shall not serve to carry or defeat action by the committee unless such vote is supported by the vote of a majority of the remaining lessees.

(f) The time when the plan of unitization shall become and be effective.

(g) The time when and conditions under which and the method by which the unit shall or may be dissolved and its affairs wound up. Laws 1945, p. 164, Sec. 5.

Sec. 286.6. *Objection to creation of unit.*

If at any time after the filing of a petition for the creation of a unit and within sixty (60) days after the entry of an order by the Commission approving the creation of the same, lessees of record of fifteen percent (15%) or more of the proposed unit area, if prior to the entry of the order by the Commission, or lessees of record of fifteen percent (15%) or more of the unit area as defined by the approved plan of unitization and order of the Commission, if after the entry of such order, shall file written protest with the Commission against the creation of the unit, the Commission shall vacate all action of any kind theretofore taken and dismiss the proceedings for the creation of such unit. The fact that a lessee joined in the petition seeking authority to create the unit or otherwise participated in any of the steps thereafter taken with the view of creating the same, shall not preclude such lessee from filing a protest pursuant to the provisions of this Section. Laws 1945, p. 165, Sec. 6.

Sec. 286.7. *Procedure and appeal.*

Except as otherwise herein expressly provided, all proceedings had under this Act including the filing of petitions, the giving of notices, the conduct of hearings and other action taken by the Commission shall be in the form and manner and in accordance with the procedure and procedural requirements provided in Sections 84 to 135, inclusive. Title 52, Oklahoma Statutes, 1941, or any

amendment thereof with reference to proceedings thereunder. Such additional notice shall be given as may be required by the Commission. The Conservation Officer, his assistant and deputies and the Conservation Attorney shall act without additional compensation as technical advisors to the Commission to the extent that the Commission may require. Any person aggrieved by any order of the Commission made pursuant to this Act may appeal therefrom to the Supreme Court of the State of Oklahoma upon the same conditions, within the same time and in the same manner as is provided in said Sections 84 to 135, inclusive, Title 52, Oklahoma Statutes, 1941, for the taking of appeals from the orders of the Commission made thereunder, except in any such appeal the Commission shall be impartial, inactive and shall not be represented directly or indirectly by the Conservation Attorney, the Attorney General or any other public official or person. The Supreme Court on appeal shall have jurisdiction and authority and it shall be its duty to review the record of proceedings and transcript of evidence and to consider the validity of the order of the Commission appealed therefrom. On appeal the order of the Commission appealed from shall be regarded as prima facie valid, fair, reasonable and equitable, but if the order is found to be contrary to the clear weight of the evidence, in any one of such respects, the same shall be vacated and set aside and the cause referred to the Commission for further proceedings not inconsistent with the judgment of the court; otherwise the said order shall be affirmed.

In addition to any other remedy provided in this Act any interested person, firm or corporation within a unit area feeling himself aggrieved by any order of the Commission or the action of a unit thereunder, may at any time institute a suit in the District Court of the County in which

the greater part of the unit area is located, as in other civil suits in equity, against the other lessees within the unit and in such suit have his rights and equities determined. Any person aggrieved by the judgment entered in such an action may appeal therefrom to the Supreme Court of the State of Oklahoma in the time and manner as appeals are taken in other civil actions. To the extent possible under existing laws the Supreme Court shall give precedence to all such appeals in the hearing and disposition thereof. Laws 1945, p. 165, Sec. 7.

Sec. 286.8. *Operations in violation of plan of unitization unlawful.*

From and after the effective date of an order of the Commission approving the creation of a unit and approving the plan of unitization applicable thereto the drilling of any well into or the operation of any well producing from the common source of supply or portion thereof within the unit area defined in the order by persons other than the unit or persons acting under its authority or except in the manner and to the extent provided in such plan of unitization shall be unlawful and is hereby prohibited. Laws 1945, p. 166, Sec. 8.

Sec. 286.9. *The nature, purposes and functions of units, and liability of owners of oil and gas rights therein for unit expense.*

Each unit created under the provisions of this Act shall be a body politic and corporate, capable of suing, being sued and contracting as such in its own name. Each such unit shall be authorized on behalf and for the account of all the owners of the oil and gas rights within the unit area, without profit to the unit, to supervise, manage and conduct the further development and operations for the

production of oil and gas from the unit area, pursuant to the powers conferred, and subject to the limitations imposed by the provisions of this Act and by the plan of unitization.

The obligation or liability of the lessee or other owners of the oil and gas rights in the several separately-owned tracts for the payment of unit expense shall at all times be several and not joint or collective and in no event shall a lessee or other owner of the oil and gas rights in the separately-owned tract be chargeable with, obligated or liable, directly or indirectly, for more than the amount apportioned, assessed or otherwise charged to his interest in such separately-owned tract pursuant to the plan of unitization and then only to the extent of the lien provided for in this Act.

Subject to such reasonable limitations as may be set out in the plan of unitization, the unit shall have a first and prior lien upon the leasehold interest only in the unitized common source of supply (exclusive of a one-eighth (⅛) royalty interest) in and to each separately-owned tract, the interest of the owners thereof in and to the unit production and all equipment in the possession of the unit, to secure the payment of the amount of the unit expense charged to and assessed against such separately-owned tract. The interest of the lessee or other persons who by lease, contract or otherwise are obligated or responsible for the cost and expense of developing and operating a separately-owned tract for oil and gas in the absence of unitization shall, however, be primarily responsible for and charged with any assessment for unit expense made against such tract and resort may be had to overriding royalties, oil and gas payments, royalty interests in excess of a one-eighth (⅛) of the production, or other interests which otherwise are not chargeable with such cost, only

in the event the owner of the interest primarily responsible fails to pay such assessment or the production to the credit thereof is insufficient for that purpose. In the event the owner of any royalty interest, overriding royalty, oil and gas payment or other interest which under the plan of unitization is not primarily responsible therefor pays in whole or in part the amount of an assessment for unit expense for the purpose of protecting such interest, or the amount of the assessment in whole or in part is deducted from the unit production to the credit of such interest, the owner thereof shall to the extent of such payment or deduction be subrogated to all of the rights of the unit with respect to the interest or interests primarily responsible for such assessment. A one-eighth (⅛) part of the unit production allocated to each separately-owned tract shall in all events be regarded as royalty to be distributed to and among, or the proceeds thereof paid to, the royalty owners free and clear of all unit expense and free of any lien therefor. Laws 1945, p. 166, Sec. 9.

Sec. 286.10. *Property and contract rights.*

Property rights, leases and other contracts, and all rights and obligations shall meet the provisions and requirements of this Act and to any valid and applicable plan of unitization or order of the Commission made and adopted pursuant hereto, but otherwise to remain in full force and effect.

Nothing contained in this Act shall be construed to require a transfer to or vesting in the unit of title to the separately-owned tracts or leases thereon within the unit area, other than the right to use and operate the same to the extent set out in the plan of unitization; nor shall the unit be regarded as owning the unit production. The unit production and the proceeds from the sale thereof shall be

owned by the several persons to whom the same is allocated under the plan of unitization. All property, whether real or personal, which the unit may in any way acquire, hold or possess shall not be acquired, held or possessed by the unit for its own account but shall be so acquired, held and possessed by the unit for the account and as agent of the several lessees and shall be the property of such lessees as their interests may appear under the plan of unitization, subject, however, to the right of the unit to the possession, management, use or disposal of the same in the proper conduct of its affairs, and subject to any lien the unit may have thereon to secure the payment of unit expense.

The amount of the unit production allocated to each separately-owned tract within the unit, and only that amount, regardless of the well or wells in the unit area from which it may be produced and regardless of whether it be more or less than the amount of the production from the well or wells, if any, on any such separately-owned tract, shall for all intents, uses, and purposes be regarded and considered as production from such separately-owned tract, and, except as may be otherwise authorized in this Act, or in the plan of unitization approved by the Commission, shall be distributed among or the proceeds thereof paid to the several persons entitled to share in the production from such separately-owned tract in the same manner, in the same proportions, and upon the same conditions that they would have participated and shared in the production or proceeds thereof from such separately-owned tract had not said unit been organized, and with the same legal force and effect. If adequate provisions are made for the receipt thereof, the share of the unit production allocated to each separately-owned tract shall be delivered in kind to the persons entitled thereto by virtue of ownership of oil and gas rights therein or by purchase

from such owners subject to the right of the unit to withhold and sell the same in payment of unit expense pursuant to the plan of unitization, and subject further to the call of the unit on such portions of the gas for operating purposes as may be provided in the plan of unitization.

Operations carried on under and in accordance with the plan of unitization shall be regarded and considered as a fulfillment of and compliance with all of the provisions, covenants, and conditions, express or implied, of the several oil and gas mining leases upon lands included within the unit area, or other contracts pertaining to the development thereof, insofar as said leases or other contracts may relate to the common source of supply or portion thereof included in the unit area. Wells drilled or operated on any part of the unit area no matter where located shall for all purposes be regarded as wells drilled on each separately-owned tract within such unit area. Laws 1945, p. 167, Sec. 10.

Sec. 286.11. *Amendments to plan of unitization.*

In any proceeding hereunder in which an order is entered creating a unit, the Commission shall retain jurisdiction thereof and of all parties in interest for the purpose of amending the plan of unitization from time to time whenever by reason of changed conditions or otherwise for good cause shown it is made to appear that such amendment is necessary or proper. Such an amendment may be made only upon the petition of lessees of record of ten percent (10%) or more of the unit area. Any amendment to a plan of unitization made pursuant hereto shall be effective prospectively only from and after the date on which the order providing for such amendment shall become final. The procedure for any such amendment including the filing of a petition, the giving of notice and

conduct of the hearing shall be the same as that required for the creation of a unit and the adoption of a plan of unitization in the first instance, insofar as applicable. Laws 1945, p. 168, Sec. 11.

Sec. 286.12. *Enlargement of units.*

The unit area of a unit may be unitized with adjoining and contiguous portions of the same common source of supply including the unit area of another or other units, and a unit created for the unitized management, operation and further development of such enlarged unit area upon the filing of a petition therefor and after notice and hearing, in the same manner, on the same conditions, but subject to the right of lessees of record of fifteen percent (15%) or more of an existing unit area to protest, and veto such enlargement or merger, all as herein provided with respect to the creation of a unit in the first instance. Upon the creation of a larger unit embracing the unit area of one or more smaller units, the larger unit so created shall thereupon supersede such smaller unit or units. Laws 1945, p. 169, Sec. 12.

Sec. 286.13. *Public lands.*

The Commissioners of the Land Office, or other proper board or officer of the State having the control and management of State land, and the proper board or officer of any political, municipal, or other subdivision or agency of the State, are hereby authorized and shall have the power on behalf of the State or of such political, municipal, or other subdivision or agency thereof, with respect to land or oil and gas rights subject to the control and management of such respective body, board, or officer, to consent to or participate in any plan or program of unitization adopted pursuant to this Act. Laws 1945, p. 169, Sec. 13.

Section 286.14. *No income or profit subject to taxation.*

Neither the unit production or proceeds from the sale thereof, nor other receipts shall be treated, regarded, or taxed as income or profits of the unit; but instead, all such receipts shall be the income of the several persons to whom or to whose credit the same are payable under the plan of unitization. To the extent the unit may receive or disburse said receipts it shall only do so as a common administrative agent of the persons to whom the same are payable. Laws 1945, p. 169, Sec. 14.

Sec. 286.15. *Definitions.*

For the purposes of this Act, unless the context otherwise requires:

(a) The term "lessee" refers not only to lessees under oil and gas leases but also to the owners of unleased lands or mineral rights having the right to develop the same for oil and gas.

(b) Any reference to a separately-owned tract, although in general terms broad enough to include the surface and all underlying common sources of supply of oil and gas shall have reference thereto only in relation to the common source of supply or portion thereof embraced within the unit area of a particular unit.

(c) The phrase "oil and gas" shall refer not only to oil and gas as such in combination one with the other, but shall have general reference to oil, gas, casinghead gas, casinghead gasoline, gas-distillate, or other hydro-carbons, or any combination or combinations thereof, which may be found in or produced from a common source of supply of oil, oil and gas or gas-distillate.

(d) The term "person" shall mean and include any individual, corporation, partnership, common law or

statutory trust, association of any kind, the State of Oklahoma or any subdivision or agency thereof acting in a proprietary capacity, guardian, executor, administrator, fiduciary of any kind, or any other entity or being capable of owning an interest in and to a common source of supply of oil and gas.

(e) The term "unit expense" shall include and mean any and all cost, expense, or indebtedness incurred by the unit in the establishment of its organization, or incurred in the conduct and management of its affairs or the operations carried on by it, authorized by the approved plan of unitization. Laws 1945, p. 169, Sec. 15.

Sec. 286.16. *Construction of Act.*

The provisions of this Act are declared to be severable, and if any section, sentence, clause or part thereof be held invalid or unconstitutional for any reason, such invalidity or unconstitutionality shall not be construed to affect the validity of the remaining provisions of this Act. Laws 1945 p. 170, Sec. 16.

Sec. 286.17. *Unitization agreements not violative of anti-trust laws or in restraint of trade.*

No agreement between or among lessees or other owners of oil and gas rights in oil and gas properties, entered into pursuant hereto or with a view or for the purpose of bringing about the unitized development or operation of such properties, shall be held to violate any of the statutes of this State prohibiting monopolies or acts, arrangements, agreements, contracts, combinations or conspiracies in restraint of trade or commerce. Laws 1945, p. 170, Sec. 17.

APPENDIX C.

CHAMPLIN REFINING COMPANY

DIVISION ORDER

TO CHAMPLIN REFINING COMPANY, ENID, OKLAHOMA:

The undersigned and each of them do hereby guarantee and warrant that they are the legal owners in the proportions set out below of all the oil produced from the Young farms, described as:

E½ of NW¼, Section 32, Township 14 North, Range 4 West, Oklahoma County, Oklahoma,

and until further notice either from you or us you will give credit for all oil received from said lease as per directions below:

CREDIT TO	DIVISION OF INTEREST	P. O. ADDRESS
	Working Interest	
Denver Producing & Refg. Co.	105/128 of Total Prod.	Box 643, Okla. City, Okla.
	Overriding Royalty	
A. Gutowsky	7/128 of Total Prod.	1816 First Natl. Bldg., Ok. City
	Royalty Interest	
James M. & Kate L. Young	16/128 of Total Prod.	Edmond, Oklahoma

After A. Gutowsky has received the balance due on $40,000.00 from 1/16 of ⅞ of total production from the above described well, the said 1/16 of ⅞ of total production shall revert to Denver Producing & Refining Company

or their assigns. The said Denver Producing & Refining Company agrees to notify Champlin Refining Company in writing when and if the said amount has been paid and hereby agrees to save Champlin Refining Company harmless from any overpayment to A. Gutowsky or assigns, if the said written notice is not given.

THE CHAMPLIN REFINING COMPANY is hereby authorized, until further notice, to receive oil from the said wells for purchase from said parties severally in the proportions named, subject to the following conditions:

FIRST—The oil run to any pipe line or tanks in pursuance of this division order shall become and be the property of the Champlin Refining Company as soon as delivery thereof to any pipe line or tank designated by the Champlin Refining Company shall have been completed.

SECOND—The oil purchased and received in pursuance of this division order shall be delivered F. O. B. to any pipe lines or tanks designated by the Champlin Refining Company, which may be able and willing to receive the same and shall be paid for to the well owners or their assigns according to their respective interests shown above at the price posted by the Champlin Refining Company for the same kind and quality of oil in the particular field on the day when such oil is received by Champlin Refining Company. Settlement therefor shall be made monthly by mailing or delivery to the person from whom such oil is so purchased, their heirs, assigns, or legal representatives, at the addresses shown above, a bank check or draft for the amount due on account of oil so purchased during the preceding month, less any taxes required by law to be deducted and paid by you as purchaser. Pipe line grades and measurements to govern and control in all settlements.

THIRD—Quality and quantity shall be determined in accordance with the conditions specified in your price post-

ing. Oil shall be steamed or otherwise properly treated when necessary to render it merchantable. The Champlin Refining Company to receive only merchantable oil.

FOURTH—The Champlin Refining Company is not expected to receive oil in definite quantities or for fixed periods or to provide storage on the credit balance plan or otherwise, except as and when the Champlin Refining Company shall now or hereafter so agree in writing.

FIFTH—Satisfactory abstracts and other evidences of title shall be furnished Champlin Refining Company by the sellers at any time on demand. In the event of a failure to so furnish such evidence of title, or in case of adverse claim of title to the land from which such oil is produced, or adverse claim of title to the oil sold and purchased under this division order, the Champlin Refining Company shall be indemnified by the undersigned against all reasonable cost and expense necessarily incurred in defending against such claims, and may retain the purchase price of such oil without interest until such adverse claim is settled and determined.

SIXTH—The Champlin Refining Company shall not be bound by change of ownership in the above described oil unless notified in writing thereof, and furnished with a certified copy of the conveyance by which such ownership is transferred.

SEVENTH—The above described interest represents our entire ownership under this lease, and this division order shall become valid and binding on each and every owner above named as soon as signed by him or her regardless of whether or not any of the other above named owners have so signed. For and in consideration of the purchase of oil hereunder, consent is hereby given to you and any pipe line company which you may cause to connect with

the wells or tanks on said land, to disconnect and remove such pipe lines, in case of termination by either you or us of purchases under this division order.

EIGHTH—Working Interest Owners and Operators who sign this division order and each of them, guarantee, and warrant, for your benefit and that of any pipe line or other carrier designated by you to run or transport said oil, that all oil tendered hereunder has been or will be produced in accordance with applicable laws and official rules and regulations.

Dated this 10th day of August, 1943
Witness of Signatures

Effective date of first oil run.
Owners sign below

ATTEST:

DENVER PRODUCING & REFINING COMPANY

/s/ Sterling Williams Secy.

By /s/ R. G. Rapp Pres.

Sterling Williams /s/
U. R. Russmir /s/
LeRoy E. Gutowsky /s/

AG A. Gutowsky /s/
JMY James M. Young /s/
KLY Kate L. Young /s/

APPENDIX "D."

(Caption omitted.)

Certificate As to the Existence of Federal Question.

The Supreme Court of Oklahoma hereby certifies that on August 26, 1954, being within the time permitted by the rules of this Court, West Edmond Hunton Lime Unit, Appellee herein, filed with this Court a Petition for Rehearing of the judgment of reversal entered by it herein on the 15th day of June, 1954; that in the brief in the Petition for Rehearing as a part of its Petition for Rehearing was the ground "that the Court erroneously nullified valid contracts"; that in the "Brief in Support of Petition for Rehearing" filed by Appellee with its Petition for Rehearing, and as a part of the same document, Appellee contended that the Unitization Statutes of the State of Oklahoma, (52 O. S. Supp. 1949, Sec. 286.1 *et seq.*) as interpreted by this Court in its decision herein, impaired the obligation of the division orders and other contracts referred to herein in violation of Section 10 of Article I of the Constitution of the United States, and deprived the holders thereof of property without due process of law in violation of Section 1 of the Fourteenth Amendment thereof, and also contended that Appellee was deprived of property without due process of law in violation of Section 1 of the Fourteenth Amendment by being subjected to a liability which was never intended by law and was never voluntarily assumed; that this Court regarded said contentions as properly before it on said Petition for Rehearing; that it became material to the determination of said petition to determine said contentions so made by Appellee, and that this Court in denying said Petition for Rehearing rejected said contentions.

IT IS HEREBY ORDERED that this Certificate, which is concurred in by a majority of the Judges of this Court, be made a part of the record in this case.

Dated this 13th day of December, 1954.

HARRY L. S. HALLEY,

Chief Justice.

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HAROLD B. WILL

No. 605

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

WEST EDMOND HUNTON LIME-UNIT,
a body politic and corporate,
Appellant,

VERSUS

J. M. YOUNG and KATE YOUNG,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS

JOHN BARRY,
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LaJolla, California;

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Oklahoma City Oklahoma,

Attorneys for Appellees.

March, 1955.

LITTLEJACK TYPESETTING CO., 18 SO. WALKER, OKLAHOMA CITY, PH. FO 9-6780

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In the
Supreme Court of the United States
OCTOBER TERM, 1954

No. .....

WEST EDMOND HUNTON LIME UNIT,
a body politic and corporate,
Appellant,

VERSUS

J. M. YOUNG and KATE YOUNG,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS

Appellees, pursuant to Rule 16 move the appeal of appellants be dismissed on the ground that the question is so unsubstantial as not to warrant further argument.

The opinion of the Supreme Court of Oklahoma is reported[1], movants will not restate the facts contained in said opinion, except to supplement same to properly present our contentions.

The unitization statutes complained of were *repealed** and a new unitization act was passed by the Oklahoma Legislature and became effective May 26, 1951.[2]

---

[1] 275 P.2d 305

* All emphasis supplied unless otherwise indicated.

[2] O. S. Ann., Title 52, Section 287.1, *et seq.*

Appellant does not complain of a breach of *its* contract, but contends the statute impaired the obligation of division orders held by the purchasers of oil from the unit and deprived such purchaser of their property without due process of law. *Such purchasers* are not complaining herein, none are parties. The division orders were not assignable, all were terminable at will and were terminated upon unitization.

The Supreme Court of Oklahoma sustained the constitutionality of this Act;[3] upon appeal to the Supreme Court of the United States, the appeal was dismissed.[4]

The appellants raised the constitutional question for the first time in their petition for rehearing, but the Supreme Court of Oklahoma did not consider the question of sufficient importance to discuss same.

Proposition I.

The Supreme Court of Oklahoma held that the unit operator was a trustee and was liable because it was guilty of a breach of trust. Such holding does not present a federal question.

Appellees were owners of royalty interests and had no voice in either the organization or management of the unit, or the selection of the unit operator.

The lessees had sole authority to select the unit operator, who was given *exclusive* control of the production and disposition of the oil from the wells in the unit.

---

[3] *Palmer Oil Corp.* v. *Phillips Petroleum Co.*, 204 Okla. 543, 231 P.2d 997.

[4] 72 Sup. Ct. 842, 343 U.S. 390, 96 L. Ed. 1022.

The Supreme Court of Oklahoma held the Act was not unconstitutional because the royalty owners were not given representation, because "the lessees have an interest that is distinctive from that of the royalty owners, but it is not *adverse* thereto because the interest of the latter are dependent upon and must rise or fall with that of the lessees."

A substantial portion of the leases in the unit are owned by major oil companies who are also purchasers of oil. Sohio Petroleum Company (hereafter referred to as Sohio) was a lessee owning numerous leases in the unit. It was named by the other lessees as the unit operator.

The Supreme Court of Oklahoma held that the unit operator stands in a position similar to that of a trustee for the royalty owners.

From September 28, to December 17, Phillips Petroleum Company, who had gathering lines in the unit area, posted a price of $3.00 per barrel. The other purchasers, including Sohio (also the unit operator) continued to pay only $2.65 per barrel.

Numerous royalty owners, upon *learning* of Phillips' posted price of $3.00, made arrangements with the unit operator and Phillips Petroleum Company to purchase their oil at the increased price. The appellees could have made the same arrangements and received the increased price of $3.00 from Phillips and would had the trustee advise them of their right, or had they been given knowledge and an opportunity to do so.

The unit operator (Sohio) and the other purchasers of the unit oil wanted to continue purchasing at $2.65, and for that reason the unit operator did not notify the royalty owners of the Phillips' posted price, or take any action that might have given these royalty owners an opportunity to act.

The unit operator furnished monthly statements to lessees and the purchasers of unit oil, listing the *value* of all oil produced from the unit at $2.65 per barrel.[5] It knew Phillips paid $3.00 a barrel for the oil it purchased, thus the unit operator supplied false information.

This deception was practiced on appellees by Champlin Refining Company, who sent an invoice to appellees[6], containing the valuation (supplied by Sohio) of all production on the basis of a value of $2.65 a barrel. The value of the oil purchased by Phillips in December, 1948, was listed in both statements at $595,685.72, whereas, Phillips actually paid $676,608.17 for such oil. Champlin left blank the column in its invoice relating to the price it paid for appellees' oil. Such conduct constituted a breach of trust on the part of the unit operator and, in the language of the Supreme Court of Oklahoma, was "not in keeping with the duty of the trustee, and fell far short of the high duty owed by the trustee, and resulted in unconscionable gains to the trustee and the direct loss to the royalty owners affected."[7]

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[5] Record 85-51.

[6] Record 85-36.

[7] *Young* v. *West Edmond Hunton Lime Unit*, 275 P.2d 304, at p. 310.

A breach of trust is a question for state courts and does not present a constitutional question.

This Court has held that it is against its policy to decide constitutional questions "if the record presents some other ground upon which the case may be disposed of."[8]

Since the case has been decided by the Supreme Court of Oklahoma on the merits and a determination of the constitutionality of the repealed statute is not necessary to a determination of said cause, it clearly appears that there is no merit in appellant's appeal and should be dismissed[9],[10].

---

[8] *Rescue Army* v. *Municipal Court of Los Angeles*, 67 Sup. Ct. 1409, 331 U.S. 549, 91 L. Ed. 1666.

[9] In *Light* v. *United States*, 220 U.S. 523, 538, 31 Sup. Ct. 485, 55 L. Ed. 570, this Court said:

> "The judgment was right on the merits, wholly regardless of the question as to whether the government had inclosed its property.
>
> "This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in *Siler* v. *Louisville & N. R. Co.*, 213 U.S. 193, 53 L. ed. 758, 29 Sup. Ct. Rep. 451, 'where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued, and is not departed from without important reasons.' The decree is therefore affirmed."

[10] In *Berea College* v. *Kentucky*, 29 Sup. Ct. 34, 211 U.S. 45, 53 L. Ed. 81, this Court held:

> "Upon this we remark that when a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision. *Murdock* v. *Memphis*, 20 Wall. 590, 636, 22 L. ed. 429, 444; *Eustis* v. *Bolles*, 150 U.S. 361, 37 L. ed. 1111, 13 Sup. Ct. Rep. 131; *Giles* v. *Teasley*, 193 U.S. 146-160, 48 L. ed. 655-658, 24 Sup. Ct. Rep. 359; *Allen* v. *Arguimbau*, 198 U.S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622."

Proposition II.

The Supreme Court of the State of Oklahoma properly held that:

> **"A division order signed by a royalty owner before the unit was created referring to his own oil from his individual acreage then producing oil, is insufficient and ineffective to authorize the subsequently created unit to dispose of the royalty owner's percentage share of the oil in the unit production, or of any of the unit oil, to a purchaser not paying the highest price available in the field."**

The purchasers of oil from the unit, under the division orders, are not parties to this litigation, they do not present the constitutionality of the statutes, only the unit operator, who had no contract, is complaining.

The division order provided:

> "The Champlin Refining Company is hereby authorized, until further notice, to receive oil from the said wells for purchase from said parties severally in the proportions named, * * *."

The purchaser did not agree to buy, nor did the seller agree to sell. It was not a contract but merely an authorization, terminable at will by either party. No vested rights were created by the division order. *Texas Co.* v. *Pettit*, 107 Okla. 247, 220 Pac. 956, cited by appellants, did not involve the same question here presented, it only dealt with estoppel.

The area included in the unit was over 18 miles long; the unit operator could produce oil from any well in said unit; it could, and did, completely close down numerous wells which, after unitization, produced no oil. It was

not required to deliver oil to any purchaser at any lease. The division order only authorized the purchase of *oil from a particular lease.* After unitization the unit operator required both the royalty owner and the purchaser of the oil to accept unit oil several miles from the location of the lease. Thus it is clear that the division order could not control after unitization, and the royalty owner owed no duty to advise the purchaser of oil of the termination of the division order. The unitization of the area was notice to all parties. The Supreme Court of Oklahoma so held:[11]

> "Obviously, an authorization to receive individually owned oil for purchase from wells located on a particular tract of land by the owners of the oil produced therefrom is not an authorization to receive other oil elsewhere produced."

The Act further provides that if an owner did not take his share of the oil, the unit operator, as agent and for the account and at the expense of such person, is authorized to market and sell or itself purchase, at not less than the market price prevailing at the time of such sale.

In many instances a well would produce much more oil than its proportionate share, whereas other wells could be completely closed down, and for that reason it is clear that before an owner could take his share of oil, a new arrangement with the unit operator was contemplated by the Act. A division order is not assignable.

In *Palmer Oil Co.* v. *Phillips Petroleum Co., supra,* the Act was sustained by a five to four vote. In stating what

---

[11] 275 P.2d 308.

the Act provided, the dissenting opinion stated that one operator would be selected and "that all oil produced from the entire tract, or from any one or several of the 72 separate tracts, would be marketed by the *one operator*—and the entire tract—was to be drilled and produced *and the oil marketed,* as if the aggregate tract constituted a single unit, covered by a single lease." The dissenting opinion was concurred in by four members of the nine-member Court. There is no language in the majority opinion indicating that any member concurring in the majority opinion placed any different construction on the power of the unit operator to market the oil.

Clearly, if the Act could authorize the Corporation Commission to divest a lessee of his right to produce the oil from the lease owned by him over the lessee's objection there could be no doubt but that the Legislature had the power to provide that upon unitization the division orders, which were terminable at will, could be, and were, terminated by unitization.

The briefs in the *Palmer* case, *supra,* did not make an issue of the construction placed on the Act by the dissenting opinion and this unit operator was not justified in ignoring the construction of the Act set out in the dissenting opinion, especially when the majority opinion does not indicate a contrary construction.

For the reasons stated appellees respectfully submit that this Court should either affirm said cause on its merits, or dismiss the appeal.

Respectfully submitted,

JOHN BARRY,
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LaJolla, California;

WAYNE W. BAYLESS,
1018 Hales Building,
Oklahoma City Oklahoma,

Attorneys for Appellees.

March, 1955.

APR 6
HAROLD B. W

In the Supreme Court of the United States

No. 605.

OCTOBER TERM, 1954.

WEST EDMOND HUNTON LIME UNIT,
a body politic and corporate,
Appellant,

vs.

J. M. YOUNG and KATE YOUNG,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9947

In the Supreme Court of the United States

No. 605.

OCTOBER TERM, 1954.

WEST EDMOND HUNTON LIME UNIT,
a body politic and corporate,
Appellant,

vs.

J. M. YOUNG and KATE YOUNG,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

Appellees argue two contentions in support of their motion to dismiss this appeal, namely (1) that no federal question is presented by the holding of the state court "that the unit operator was a trustee and was liable because it was guilty of a breach of trust" and (2) that the state court properly held that unitization automatically terminated division orders executed prior to the effective date of unitization.

Unquestionably, it was within the province of the Supreme Court of Oklahoma to determine whether or not the unitization statutes of that state made fiduciaries of units created thereunder.* However, in order to hold

* Subject only to the limitations imposed by due process, which are discussed on page 21 of our Jurisdictional Statement.

appellant guilty of a breach of trust in favor of appellees, it was necessary for the state court to dispose of division order contracts executed by appellees prior to unitization. This is exactly what the majority decision of the state court accomplished by the simple device of declaring the division orders nullified by unitization.

While the state court majority ignored or distorted many of the undisputed facts, they could not ignore these stipulated facts (R. 114), namely:

> A. That the appellees prior to unitization had executed division orders for the sale and delivery of their royalty oil to certain oil purchasers, and that these division orders "have been in full force and effect since date of first production from plaintiff's respective tracts."
>
> B. That appellees were paid for their royalty oil in accordance with said division orders by checks issued by the oil purchasers who held their division orders. Even during the period in controversy (which began nearly one year after the effective date of unitization) appellees received, accepted and cashed checks from the oil purchasers who held their division orders.

The state court majority fully recognized that, if the oil purchasers who held appellees' division orders were entitled to receive appellees' royalty oil, appellant could not be guilty of a breach of trust by reason of its failure to take and market appellees' royalty oil. Thus in Syllabus 1 of their decision* the majority stated (Jurisdictional Statement, page 25):

---

* Under Oklahoma law, the syllabus is prepared by the court and states the point of law determined by the court, 12 Okl. Stat. Sec. 977.

> "It is the duty of the unit organization to distribute such allocated percentage to each such owner in oil if desired, or the proceeds thereof determined at the highest market price available, *in the absence of an agreement with any such respective owner for other disposition of his respective percentage share in the unit production.*"

To the same effect, the opinion states (Jurisdictional Statement, page 36):

> "We hold the statutes require the operator of the unit, in this case, the defendant, to account to all the owners of oil rights within the unit area for their respective portions or percentages of the unit production at the highest market price available at the time of such production under the circumstances that such owners have not received in kind their share of such production, *or have not expressly authorized the unit or the operator for the unit to deliver same to a particular purchaser.*"

Having made this holding, the state court majority was able to complete its decision by holding that the unitization statute had the effect of terminating, or nullifying, the division orders. This it did in Syllabus 4 (Jurisdictional Statement, page 26).

Thus, the holding that the division orders were nullified was absolutely necessary to the judgment of the state court against appellant.

It is this holding which violates both the impairment of contracts clause of Article I, Section 10, and the due process clause of the 14th Amendment to the Federal Constitution.

It is true, as noted by appellees, that appellant was not a party to the division order contracts. However, it is equally true that the liability imposed on appellant by the

state court judgment is predicated upon nullification of contracts between appellees and the oil purchasers who held their division orders. Had these contracts been respected as required by Article I, Section 10, the state court judgment against appellant could not have been rendered. This point is disposed of in appellant's jurisdictional statement (pp. 19 and 20).

In support of the state court holding, appellees make the tenuous argument that the unitization statute divests a lessee of his right to produce oil from the land covered by his lease, and therefore the legislature had the power to provide that unitization would terminate division orders. It is true that unitization vests in the unit the sole right to develop and operate lands within the unit area and thereby deprives each lessee of the right to operate under his own lease. However, unitization gives the lessee a substituted right by requiring that there be allocated to his land a fair and equitable percentage of all production from the unit area, and by giving to the owners of royalty and working interests in each tract of land, the absolute right to take and dispose of production allocated to that tract.

No such substitute right is available to the holder of a division order or other contract for the purchase of oil. If, as the state court majority held, unitization nullifies previously executed division orders, these contract rights are completely destroyed. No substitute right of any kind is available. As pointed out on pages 17 and 18 of our Jurisdictional Statement, the police power gives no basis for utterly wiping out these contracts without substitution.

Appellees also argue that the unitization statutes involved in this case were repealed, and a new unitization act enacted, on May 26, 1951. The point of this argument

is beyond us, since the new statute is identical with the old in all respects here pertinent.

In appellees' argument, particularly under proposition 1, they have not hesitated to misrepresent the facts of this case for the obvious purpose of misleading this Court, even as a majority of the state court were similarly misled. Appellees make the following statement on page 4 of their motion to dismiss:

> "The unit operator furnished monthly statements to lessees and the purchasers of oil, listing the value of all oil produced from the unit at $2.65 per barrel. It knew Phillips paid $3.00 a barrel for the oil it purchased, thus the unit operator supplied false information."

The monthly statements referred to are fully explained by an exhibit appearing in the Record at page 193, et seq., and by the deposition of the one witness who testified orally. (R. 87, et seq.) These statements were prepared in strict conformity with a procedure agreed upon by the oil purchasers in October, 1947—nearly a year before commencement of the period here in controversy. They related only to the settlement among such oil purchasers themselves for monthly over-runs, and provided expressly that such settlement be made at the last previous uniform purchase price. The Record shows that these statements were furnished only to the four pipe-line companies involved in the purchase of oil. Neither appellees nor any other royalty owner even knew of the existence of these statements until they were brought out on cross-examination by appellees of a witness for appellant.

Although appellees are well aware of these facts, and are well aware that no one was deceived or misled by these statements, appellees would have this Court believe

that the statements were issued as part of a scheme to defraud royalty owners.

Appellees also state that the unit operator and other purchasers of unit oil "wanted to continue purchasing at $2.65 per barrel, and for that reason the unit operator did not notify the royalty owners of the Phillips' posted price." This statement is pure fabrication, without the slightest support in the Record. The one witness who testified orally was an employee of unit operator, and his testimony is undisputed to the effect that the unit operator did nothing simply because the price paid by oil purchasers was not the concern of the unit operator.

The statements in the third paragraph on page 4 of appellees' brief are equally unwarranted and misleading.

While the motion to dismiss seeks to picture appellees as royalty owners who have been deceived and defrauded by the machinations of appellant, it is highly significant that neither J. M. Young nor Kate Young (nominal plaintiffs) nor any other royalty owner, appeared to testify in this case. The obvious explanation for this anomaly is that no royalty owner was in position to give any testimony that would aid the case of appellees, for the simple reason that none was deceived or defrauded.

When all these misleading statements are cleared away, and the case is viewed from the standpoint of the record, the statute and the decision, it will be apparent that the state court majority has construed the statute to impair the obligation of valid and subsisting contracts, thus giving rise to a substantial constitutional question within this Court's appellate jurisdiction.

We believe it will also be apparent that in reaching its decision the state court majority has, as pointed out on pages 21 through 24 of our Jurisdictional Statement, so

utterly disregarded statutory provisions and stipulations as to violate the due process clause of the Fourteenth Amendment and to warrant the issuance of a writ of certiorari.

We submit that appellees' motion should be overruled.

Respectfully submitted,

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No. 605. WEST EDMOND HUNTON LIME UNIT *v.* YOUNG ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *T. Murray Robinson* and *Rufus S. Day, Jr.* for appellant. *John Barry* for appellees. Reported below: 275 P. 2d 304.